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IN THE

Supreme Court of the United States

FAITH CENTER CHURCH EVANGELISTIC MINISTRIES and HATTIE HOPKINS,

Petitioners,

v.

FEDERAL D. GLOVER, MARK DESAULNIER, JOHN M. GIOIA, MILLIE GREENBERG, JOHN W. SWEETEN, ANNE CAIN, PATTY CHAN, LAURA O'DONAHUE and GAYLE B. UILKEMA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

The official policy of the Contra Costa County, California Library Board permits community groups to use its meeting rooms for "educational, cultural and community-related programs and activities," but prohibits "religious services" while allowing "religious speech," such as lectures on how to pray. Faith Center Evangelistic Ministries applied to hold two meetings at the Antioch Library meeting room for "Prayer, Praise and Worship Open to the Public, Purpose to Teach and Encourage Salvation thru Jesus Christ and Build Up the Community." After permitting the first meeting, the County denied Faith Center permission for the second meeting because of its religious content. A divided Ninth Circuit panel upheld the exclusion of "religious services" from the meeting rooms and vacated the district court's preliminary injunction in favor of Faith Center. The Ninth Circuit denied rehearing en banc over the dissent of seven judges. The questions presented are:

1. Whether the First Amendment allows the County -- in conflict with a decision by the Second Circuit -- to prohibit expression called "religious services" but permit other religious speech in a forum generally open to community groups for expressive activities?

2. Whether the Ninth Circuit erred in holding -- in conflict with decisions by the First, Third, Fourth, Fifth and Eighth Circuits -- that government facilities opened broadly by policy to community groups for "educational, cultural and community-related programs and activities," are not a "designated public forum" but instead are a "limited forum," from which the government may exclude private religious expression, such as "religious services?"

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent companies or nonwholly owned subsidiaries.

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OPINIONS BELOW

The Ninth Circuit's order of March 9, 2007 revising the panel decision is reported at 480 F.3d 891 and appears in the Appendix at 1a. The opinion of the U.S. District Court for the Northern District of California granting the petitioners' motion for a preliminary injunction is unreported and appears in the Appendix at 66a. The Ninth Circuit's order of March 9, 2007 denying the petition for rehearing en banc and suggestion for rehearing, and the dissent of seven judges, appears at Appendix 87a.

JURISDICTION

The Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc on March 9, 2007. App. 87a. The Ninth Circuit issued the panel decision on September 20, 2006, and the full court revised the panel decision on March 9, 2007. App. 1a. This Court has jurisdiction to review this decision under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Amendments I and XIV, are found in the Appendix at 105-107a. The facilities use policy for the Contra Costa County Library Board is found in the Appendix at 108a.

STATEMENT OF THE CASE

Faith Center Evangelistic Ministries ("the Church"), an evangelical Christian church, applied to rent the meeting room at the public library in Antioch, California. Contra Costa County operates the library and the meeting rooms, which it opens generally to the public for expression. The Church desired to meet two different days for meetings that would consist of "Prayer, Praise and Worship Open to the Public,

Purpose to Teach and Encourage Salvation thru Jesus Christ and Build Up [the] Community." App. 4a. Participants at Faith Center's meetings generally "(a) discuss educational, cultural, and community issues from a religious perspective; (b) engage in religious speech and religious worship; and (c) engage in discussing the Bible and other religious books [as well as] teaching, praying, singing, sharing testimonies, sharing meals, and discussing social and political issues." *Id.*

County Library's Meeting Room Policy

Contra Costa County by policy broadly opens the library meeting rooms at its various branches to a wide spectrum of expression by community groups. App. 108-109a. Specifically, "It is the policy of the Contra Costa County Library to encourage the use of library meeting rooms for educational, cultural and community related meetings, programs, and activities."*Id.* The policy applies to all of the branch libraries, including the meeting room at the Antioch Branch Library in Antioch, California. App. 3a. The meeting room is available for use by community groups during library business hours on a first-come, first-served basis. App. 3a.

County Library's Practice of Allowing A Broad Range Of Community Groups to Use Library Meeting Rooms

In practice, a broad array of community groups use library meeting rooms for many different kinds of expression and advocacy, including:

- East Contra Costa Democratic Club to present issues and candidates to members;

- Sierra Club for letter writing;

- Narcotics Anonymous for recovery from drugs;
- Jewish Family and Children's Services of the East Bay women's group to dialogue with multicultural groups;
- Moraga Historical Society;
- Bucks & Ducks, Inc. for monthly business;
- Walden Park Homeowners Association for a board of directors meeting;
- Moragans for Housing Options for advocacy for a variety of housing in Moraga and updating members and public on town plans
- IPMS Plastic Modelers to promote plastic modeling;
- Boy Scout Troop 153 for planning;
- Girls Scouts of Walnut Creek for event planning; and
- Concord Art Association to bring art to the public and for a business meeting.

Appellees' Supplemental Excerpts of Record (Ninth Circuit), pp. 2-15.

The County's History of Anti-Religious Speech Policies

The County Library's current policy at issue in this case prohibits use of library rooms for "religious services." This current policy springs from a history of policies that expressly

discriminated against religious expression in these meeting rooms since at least 1992. First, the County Library's policy, Resolution No. 92/793, stated that "[l]ibrary meeting rooms shall not be used for religious purposes." App. 69a. The County replaced that policy with Resolution No. 93/525, which forbade the use of library meeting rooms for "religious services or activities." *Id.* Then the County enacted the current policy, Resolution No. 2004/655, which states that "[l]ibrary meeting rooms shall not be used for religious services." App. 108a. However, the County Library allows religion, as a topic, to be discussed in library meeting rooms. App. 75a.

Faith Center and Its Meeting Applications

Faith Center is led by Pastor Hattie M. Hopkins. App. 4a. Pastor Hopkins believes that there are many people who need to hear the gospel of Jesus Christ, but are reluctant to set foot inside a traditional church building. *Id.* Thus, Pastor Hopkins holds organized meetings in non-traditional buildings under the auspices of Faith Center. *Id.* Participants in Faith Center's meetings discuss educational, cultural, and community issues from a religious perspective by engaging in religious speech, including teaching and discussion about the Bible and other religious books, praying, singing, sharing testimonies, sharing meals, and discussing social and political issues. *Id.*

In May 2004, Pastor Hopkins submitted two applications to use the County Library's meeting room on May 29, 2004, and July 31, 2004. *Id.* These two applications indicated that the purpose of Faith Center's meetings was "Prayer, Praise and Worship Open to the Public, Purpose to Teach and Encourage Salvation thru Jesus Christ and Build Up Community."*Id.* Library officials approved the two meetings. *Id.*

Faith Center planned to advertise its May 29, 2004 meeting at the County Library with a flyer that presented its "Women of

Excellence Conference." App. 4a. The flyer included a schedule for the following activities: registration; then a session called, "Wordshop," which was a lecture on how to pray, then refreshments; and then a session containing praise and worship with a sermon. App. 5a.

Faith Center's May 29, 2004 Meeting

On May 29, 2004, Pastor Hopkins held the planned "Prayer, Praise and Worship" meeting at the Antioch Library's meeting room. App. 5a. Out of consideration for the County Library's patrons, Faith Center participants did not use musical instruments or amplified sound. *Id.* Toward the end of the meeting, County Library officials informed Faith Center representatives that groups were not permitted to use library meeting rooms for religious activities. *Id.* Pastor Hopkins asked if the reason for prohibition was because of any excessive noise resulting from the Faith Center meeting. *Id.* The County Library officials said noise was not the problem, but rather the religious content of the meeting. App. 5a. The County Library officials then showed Pastor Hopkins the current policy that states that "[l]ibrary meeting rooms shall not be used for religious purposes." App. 69a.

After a series of phone calls and letters, the County Library officials informed Pastor Hopkins that Faith Center could not meet for its second meeting planned for July 31, 2004 and that the reservation would be removed from the calendar. App. 6a and 72a. The County later stated that the Church could have met for the "wordshop" portion of the meeting, because it contained religious teaching on prayer and not worship, but could not meet for the portion of the meeting where the Church engaged in "praise and worship." App. 7a and 90a.

Pastor Hopkins wants to hold future meetings at the Antioch Library meeting room approximately one Saturday every other

month, from 11 a.m. to 3 p.m. App. 72a. Absent the preliminary injunction issued by the District Court, Pastor Hopkins cannot access the Antioch Library meeting room under the County Library's current policy, which forbids the use of library meeting rooms for "religious services." App. 108a - 109a. The County Library applies the "religious services" prohibition to encompass the content of Faith Center's meeting of "prayer, praise and worship."

The District Court Opinion

The District Court granted the Church's motion for preliminary injunction in an opinion dated May 23, 2005. App. 85a. The District Court ruled that the County had engaged in viewpoint discrimination by excluding a worship service that was not "mere worship." App. 72a-83a. Some of the activities the Church engaged in at the library meeting room in the May 29, 2004 meeting "were permissible," the District Court ruled, App.77a, for example, "[p]laintiffs discussed otherwise permissible topics from a religious viewpoint." *Id.*

The District Court relied on the Second Circuit's decision in *Bronx Household of Faith v. Board of Education of the City of New York*, 331 F.3d 342 (2d Cir. 2003). In *Bronx Household*, the Second Circuit upheld a preliminary injunction enjoining the New York City public schools' policy barring "religious services or instruction" from a forum opened to community groups for use after hours for "social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." *Bronx Household of Faith*, 331 F.3d at 348.

The District Court relied on *Bronx Household of Faith* and the approach the Second Circuit did of examining the component parts of what the church did in its "service." The District Court granted the preliminary injunction because of the

similarity between the specific expressive activities that the church did in *Bronx Household, e.g.*, "the singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies, and social fellowship among the church members," App. 78a-79a, quoting 331 F.3d at 347, and the expressive activities at the meeting in *Faith Center.* The District Court stated:

> The Second Circuit concluded that the plaintiffs were substantially likely to prevail on their First Amendment claims because the court found "no principled basis on which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that [plaintiffs] have proposed for [their] Sunday meetings." *Id.* at 354. Recognizing that some of plaintiffs' proposed activities, such as prayer, singing of Christian songs, and communion, were "quintessentially religious," the court also noted that the plaintiffs' meetings encompassed secular elements, like a fellowship meal. The court concluded that "[o]n these facts, it cannot be said that the meetings of the Bronx Household of Faith constitute only religious worship, separate and apart from any teaching of moral values." *Id.*

District Court Opinion, App. 78a. The District Court granted the preliminary injunction against the County's anti-religion policy, and the County appealed to the Ninth Circuit.

The Ninth Circuit Opinion

By a 2-1 vote, the Ninth Circuit vacated the preliminary injunction granted by the District Court and upheld the County's policy. The Ninth Circuit ruled that the County could ban "mere religious worship" under *Good News Club v. Milford*

Central Schools, 533 U.S. 98 (2001), and that the County's policy did just that. App. 28a - 29a. The County did not engage in unconstitutional viewpoint discrimination, the Ninth Circuit ruled., although it acknowledged that some of the Church's expression could not be excluded from the forum, e.g., the lecture on prayer, the Church had designated one session as "prayer, praise and worship." Because the Church had defined one portion of its meeting essentially as "pure religious worship," the County could exclude it under *Good News Club.* "Faith Center's afternoon activities on May 29, 2004, as described by Faith Center itself, consisted entirely of praise and religious worship," App. 31a., and therefore, could be excluded by the County.

The Ninth Circuit upheld this exclusion by finding that the County had created only a "limited forum," so the exclusion of religious services need only be "viewpoint neutral and reasonable in light of the purpose served by the forum." App.18a-19a. The Ninth Circuit found the exclusion of "religious services" reasonable.

The Ninth Circuit ruled that even though the County opened the meeting rooms for a "broad purpose" of "meetings, programs, or activities of educational, cultural or community interest," the County did not show "an intent to create a public forum by designation," App. 16a. The Ninth Circuit agreed with the County that allowing a religious service in this forum would be inconsistent with the County's purpose "to preserve the character of the forum as a common meeting space, an alternative to the community lecture hall, the corporate board-room, or the local Starbucks." App.19a.

The Ninth Circuit found the religious exclusion reasonable "in light of the library policy so that the Antioch forum is not transformed into an occasional house of worship." App.19a. Religious groups are controversial, the Ninth Circuit stated, so

it is reasonable for the County to exclude them from this forum. "The County reasonably could conclude that the controversy and distraction of religious worship within the Antioch Library meeting room may alienate patrons and undermine the library's purpose of making itself available to the whole community." App. 20-21a.

The Ninth Circuit ended by distinguishing between "religious worship," which can be excluded from the forum, and "religious speech," which cannot. "To that end, the County invited the district court to craft an injunction that ensured Faith Center's right to conduct activities in the meeting room that express a religious viewpoint, and allowed the County to exclude religious worship services." App. 36-37a. The Ninth Circuit vacated the preliminary injunction and remanded to the District Court to "craft an appropriate injunction after soliciting the views of the parties." *Id.*

Judge Karlton's Concurrence

Judge Karlton, a district court judge sitting by designation, wrote a concurring opinion sharply criticizing this Court's equal access doctrine. He criticized this Court's decisions in *Good News Club* and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) because they are based on "the High Court's purported inability to distinguish between a sermon and a speech," App. 38a. He said these cases "simply do not" present situations of viewpoint discrimination because "religious speech is categorically different than secular speech and is subject to analysis under the Establishment and Free Exercise Clause without regard to the jurisprudence of free speech." *Id.* Judge Karlton criticized this Court's equal access doctrine because it does not use the Establishment Clause to exclude religious expression from government forums. By permitting this private religious expression in a public forum, the government fails to recognize "the passions that deeply-held

religious views engender" App.39a. For example, in Northern Ireland, "Catholics and Protestants kill each other in an effort to establish governmental power," *id.*. "In Iraq, where Shi'a and Sunni engage in similar slaughter," *id.*, and several other similar examples. He ended his opinion by stating that "I concur in the opinion because, as a subordinate judge, it is my duty to adhere to the precedent of the Supreme Court 'no matter how misguided.'" (Citation omitted). App. 40-41a.

Judge Tallman's Dissent

Judge Tallman dissented from the panel's decisions vacating the preliminary injunction. He stated that the County engaged in "viewpoint discrimination" by "exclud[ing] certain members of the community from engaging in activities that fall squarely within the policy's scope by examining the way an applicant's viewpoints are expressed." App. 41-42a. He said that the majority opinion conflicted with this Court's decision in *Widmar* v. *Vincent*, 454 U.S. 23 (1981) and the Second Circuit's decision in *Bronx Household of Faith*, which permitted religious groups to meet for worship services in forums opened under policies similar to the one here. App. 56a -60a.

Judge Tallman further criticized the majority's "strange rule that '[r]eligious worship services can be distinguished from other forms of religious speech by the adherents themselves'" that "creates a system whereby the applicant itself decides what constitutes worship." App. 48a. He wrote that this creates excessive entanglement problems under the Establishment Clause because "the County will still have to determine what is and what is not religious worship in instances where a group does not identify in such detail its activity." App. 48a.

Judge Tallman also pointed out that the majority erred by invoking the "mere religious worship" language from *Good News Club* to uphold the County's policy. "Faith Center has

never claimed that its services are *mere* religious worship, devoid of speech on permissible secular topics." App. 59a.

Judge Bybee's Dissent for Seven Judges From the Ninth Circuit's Denial of Rehearing En Banc

Judge Bybee, writing for himself and six other judges, dissented from denial of rehearing en banc:

> The panel majority's decision permits the government to single out what it calls "mere religious worship" for exclusion from a forum that it has opened broadly for use by community and cultural groups. In so doing, the majority has disregarded equal-access cases stretching back nearly three decades, turned a blind eye to blatant viewpoint discrimination, and endorsed disparate treatment of different religious groups.

App. 88a - 89a.

Judge Bybee criticized the majority opinion for upholding the County's actions here when "the County's sole basis for excluding Faith Center from the library was the religious character of its speech activities." App. 92a. By upholding this exclusion of religious services, Judge Bybee wrote, "the majority has effectively relegated religious worship to an inferior status vis-à-vis community and cultural speech that claims a secular component." *Id.*

The majority's opinion creates Establishment Clause concerns, Judge Bybee wrote, because it treats various religions differently due to the fact that they define and engage in "worship" differently. "Under the majority's approach, a diverse range of religions may use the County's library meeting rooms for 'religious services' without fear of County censorship because their services cannot be characterized as 'mere

worship.'" App. 101a. Judge Bybee argued that the Ninth Circuit en banc should have granted review and reinstated the District Court's preliminary injunction.

REASONS FOR GRANTING THE PETITION

This Court should grant review and reverse the two major errors in the Ninth Circuit's *Faith Center* opinion. First, the decision unconstitutionally distinguishes between "religious services," [worship], which the County may ban from the forum, and religious speech, which it cannot ban. App. 32a-36a. This Court rejected such a distinction in *Widmar v. Vincent*, 454 U.S. 263 (1981).

Religious worship is not a second class form of expression that the government may ban from a forum generally open for indistinguishable "secular" expression. The Ninth Circuit's decision squarely conflicts with the Second Circuit's ruling in *Bronx Household of Faith v. Board of Education of the City of New York*, 331 F.3d 342 (2d Cir. 2003), which permitted a church to meet for Sunday morning services in a forum similarly open broadly to community groups and to engage in expressive activities similar to the ones here.

The Ninth Circuit's aberrant reasoning leads to inconsistent results that violate the First Amendment. For example, the Ninth Circuit spoke approvingly of the County's policy and practice permitting the Church to give a lecture about prayer, one that "teach[es] people how to pray or communicate with a divine presence," App. 36a, as long as it is not a "religious service." The Ninth Circuit spoke approvingly that the County permits private groups to "engage in discussing the Bible and other religious books [as well as] teaching, praying, singing, sharing testimonies, sharing meals, and discussing social and political issues," App. 27a, as long as those component parts

do not aggregate into a whole constituting a forbidden "religious service." The County's arbitrary and inconsistent policy violates the First Amendment.

The second major error that invites this Court's review is the Ninth Circuit's ruling that a forum opened broadly for expression by a wide range of community groups and subject matter is only a "limited forum," not a "designated public forum." This means that any exclusions from the forum, such as one here barring "religious services," are judged only by a permissive reasonableness and viewpoint neutrality standard, not the strict scrutiny of the compelling state interest standard. This led the Ninth Circuit to reject the Church's claim of content-based and viewpoint discrimination because "[r]eligious worship, on the other hand, is not a viewpoint, but a category of discussion within which many different religious perspectives abound." App. 29a.

These major errors conflict with this Court's equal access decisions, such as *Widmar v. Vincent,* 454 U.S. 263 (1981) and *Good News Club v. Milford Central Schools,* 533 U.S. 98 (2001). The exclusion of religious services from a forum generally open for indistinguishable "secular" expression violates the First Amendment's Freedom of Speech Clause.

I. THE NINTH CIRCUIT'S DECISION CREATES AN UNCONSTITUTIONAL DISTINCTION BETWEEN "RELIGIOUS SERVICES" AND "RELIGIOUS SPEECH"

A. The Ninth Circuit's Decision Conflicts With A Decision of the Second Circuit In A Similar Case.

The Ninth Circuit decision here conflicts with the Second Circuit decision in *Bronx Household of Faith v. Board of Education of the City of New York*, 331 F.3d 342 (2d Cir. 2003),

and this Court's decision in *Widmar* by distinguishing between "religious services" [worship], and "religious speech." The Ninth Circuit essentially ruled that religious worship is less protected under the First Amendment and can be banned from a forum, while religious speech or discussion has more protection and must be permitted. App. 32a-36a. This distinction flatly collides with this Court's decision in *Widmar* which addressed that specific question and ruled that religious worship and religious speech are both equally protected by the First Amendment:

> Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in **religious worship** and **discussion**. These are forms of speech and association protected by the First Amendment.

Widmar, 454 U.S. at 269 (emphasis added). *See also Widmar*, 454 U.S. at 269, n. 6 (specifically rejecting the distinction between worship and other speech).

The Ninth Circuit's decision conflicts with the Second Circuit's decision in *Bronx Household of Faith*. Judge Tallman, in his dissent, stated that "*Bronx Household* parallels this case in many ways and is instructive on the interpretation of the precedent set by *Good News Club.*" App. 57a. The Bronx Household of Faith, a local church, applied to rent space in a New York City public school for Sunday morning meetings that Judge Tallman wrote "can fairly be described as religious worship," *id.*, citing to *Bronx Household,* 331 F.3d at 345. The New York City Board of Education had a policy similar to the one at issue in this case, which permitted community groups to meet in school buildings during nonschool hours for "social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." *Id.* at 348.

The Bronx Household of Faith described the component parts of its Sunday morning meeting as "the singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies and social fellowship among the church members." *Id.* at 347. Bronx Household of Faith sought a preliminary injunction to permit it to meet in a New York City public school and also to enjoin the policy's ban on "religious services or religious instruction" by community groups meeting during nonschool hours. *Id.* at 346. The District Court granted the preliminary injunction, and the Second Circuit affirmed. *Id.* at 348, 357.

The Second Circuit relied on *Good News Club* to uphold the preliminary injunction because the expressive activities the church did in the New York schools after hours is similar to the activities the religious group did in *Good News Club*. This Court in *Good News Club* characterized the Club's activities as "the teaching of morals and character development from a particular viewpoint," 533 U.S. at 111. The Second Circuit stated that this characterization "cannot be divorced from Justice Souter's detailed description [in his dissent] of the Club's activities [as worship] that the majority adopted as accurate." *Bronx Household*, 331 F.3d at 354 (citing *Good News Club*, 533 U.S. at 112, n.4). The Second Circuit could not find any "meaningful distinction" between the activities engaged in by Bronx Household and the activities done by the group in *Good News Club*.

In this case, the District Court granted the preliminary injunction by relying on the Second Circuit's decision in *Bronx Household of Faith*. App.77a. The District Court found that the County had engaged in viewpoint discrimination, as this Court found in *Good News Club*. App. 77a-80a.

Here, in sharp contrast to the Second Circuit, the Ninth Circuit tried to parse the parts of Faith Center's meetings into those containing protected "religious speech" from those containing excludable "religious worship." App. 26a-27a. The Ninth Circuit remanded the case back to the District Court to fashion a preliminary injunction allowing the aspects of Faith Center's meetings that contain religious speech, but excluding those containing "religious worship." App. 36a - 37a.

The Ninth Circuit's decision cannot be reconciled with the Second Circuit's decision in *Bronx Household of Faith.* As Judge Tallman stated in his dissent, "[t]he only differences between the church's activities in *Bronx Household* and those of Faith Center is that the Bronx Household church did not call its activities 'worship' and failed to conveniently separate on a flyer the 'worship' portion of its activities with a fellowship meal discussing secular topics." App. 59a.

This Court should grant review to determine whether the First Amendment permits the County to single out religious services or "worship" for exclusion from a forum generally open to community groups to engage in expression indistinguishable from that of Faith Center.

B. This Court Should Take This Case To Clarify That Its Reference to "Mere Religious Worship" In *Good News Club* Did Not Create A Less-Protected Category of Speech That Government May Ban From Its Forum.

This Court's reference to "mere religious worship" in footnote 4 of *Good News Club v. Milford Central School,* 533 U.S. 98 (2001), has been misinterpreted by the lower courts to mean that the government may (or must) single out "mere religious worship" and exclude it from a forum generally open for expression. The Ninth Circuit here and the Second Circuit

in *Bronx Household* both wrestled with that language from *Good News Club,* and came to similar conclusions that "mere religious worship" is a genus of less-protected speech that may be banned from a forum open generally for expression.

This Court in *Widmar* rejected the notion that "religious worship" is a separate and inferior form of expression different than "religious speech," and held that, the government may ban "religious worship" from a public forum. *See Widmar*, 454 U.S. at 269, n.6. However, the Ninth Circuit dismissed this passage from *Widmar* (App. 32a-33a) and erroneously concluded that the government may ban worship services from a forum generally opened to all because of the "mere religious worship" language in footnote 4 of *Good News Club.* App. 25a-29a. This Court should grant review to clarify that the reference to "mere religious worship" in *Good News Club* does not overrule the substantive discussion and rejection of the "religious worship/religious speech" division in *Widmar.*

The "mere religious worship" language in question from *Good News Club* appears in footnote 4:

> Despite Milford's insistence that the Club's activities constitute "religious worship," the Court of Appeals made no such determination. It did compare the Club's activities to "religious worship," 202 F.3d, at 510, but ultimately it concluded merely that the Club's activities "fall outside the bounds of pure 'moral and character development,' " *id.*, at 511. **In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values.**

Good News Club, 533 U.S. at 112 n. 4 (emphasis added)

The Ninth Circuit interpreted the phrase, "mere religious worship" as establishing a separate category of expression that may be excluded from a forum:

> Second, the Court drew a distinction between the Club's activities and "mere religious worship, divorced from any teaching of moral values." *Id.* at 112, 121 S.Ct. 2093 n. 4. Although the school district contended that the Club's activities constituted religious worship, the Court rejected that characterization and noted that the court of appeals made no such determination. The Court drew a line at religious worship because it did not regard worship in this case as merely a "viewpoint from which ideas are conveyed." *Id.* To the contrary, pure religious worship held a purpose unto itself, and it exceeded the boundaries of a forum limited to a discussion of the moral and character development of children. *See id.* at 138 n. 3, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (Souter, J., dissenting).

App. 25a-26a. The Ninth Circuit used this supposedly meaningful distinction to uphold the County's policy excluding "religious services." The Ninth Circuit parsed through each aspect of Faith Center's event, deciding that the Church could engage in "discussing the Bible and other religious books [as well as] teaching, praying, singing, sharing testimonies, sharing meals, and discussing social and political issues," App. 27a, because these were similar to subjects discussed by other groups using the meeting rooms. App. 27a-28a.

The Ninth Circuit upheld the County's policy barring "religious services" by assuming that it was the same as "mere religious worship" referred to in *Good News Club*. "Faith Center's afternoon activities on May 29th, however, did not consist of religious viewpoint activities. Faith Center occupied the Antioch forum expressly for 'praise and worship' and in

doing so Faith Center exceeded the boundaries of the library's limited forum. The district court understood, and Faith Center did not dispute, the contention that the afternoon activities constituted pure religious worship services." App. 28a (emphasis added).

Although the Second Circuit in *Bronx Household of Faith* reached the right result in upholding the injunction invalidating the New York City Board of Education's policy banning "religious services and instruction," it showed the same confusion over whether the reference to "mere religious worship" in *Good News Club* means that government may single out "mere religious worship" and exclude it from a forum generally open to the public. The Second Circuit stated:

> The [Supreme Court] majority [in *Good News Club*] did not say that the meetings were somehow distinct from worship services, but simply observed that they were not **"mere religious worship**, divorced from any teaching of moral values." *Id.* at 112 n. 4.
>
> We find no principled basis upon which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that the Bronx Household of Faith has proposed for its Sunday meetings at Middle School 206B.... On these facts, it cannot be said that the meetings of the Bronx Household of Faith constitute **only religious worship**, separate and apart from any teaching of moral values. 533 U.S. at 112 n. 4, 121 S.Ct. 2093.

Bronx Household of Faith, 331 F.3d at 354 (emphases added).

The reference to "mere religious worship" in *Good News Club* has eclipsed this Court's thorough discussion in *Widmar* recognizing full First Amendment protection for "religious

worship," just as it protects "religious speech." This Court should grant review in order to direct the lower courts back to *Widmar* on this point to clear up the confusion created by the "mere religious worship" reference in *Good News Club.*

In *Widmar,* this Court devoted an extensive footnote explaining three reasons why religious worship and religious speech are both equally protected under the Free Speech Clause. *See Widmar*, 454 U.S. at 269, n. 6. The Ninth Circuit dismissed *Widmar*'s reasoning as mere "dicta that was not central to the Court's holding," *Faith Center*, 462 F.3d at 1212, App. 32a. But this Court repeated this principle in its majority opinion of *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753 (1995):

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free speech clause without religion would be *Hamlet* without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, *Heffron, supra*, at 647, **or even acts of worship**, *Widmar, supra* at 269, n. 6.

Pinette, 515 U.S. at 760. (emphasis added).

The first reason this Court gave in *Widmar* was that there is no intelligible way for First Amendment purposes to distinguish between "religious speech" and "religious worship":

> There is no indication when "singing, hymns, reading scripture, and teaching biblical principles," *post* at 283, cease to be "singing, teaching and reading" -- all apparently forms of "speech," despite their religious subject matter -- and become unprotected "worship."

Widmar, 454 U.S. at 269 n. 6.

Second, to distinguish between "protected" religious speech and "less protected" religious worship would require the government and courts to delve deeply into a religious group's affairs in violation of the Establishment Clause:

> [E]ven if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer (citations omitted). Merely to draw the distinction would require the university -- and ultimately the courts -- to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases (citations omitted).

Widmar, 454 U.S. at 269 n. 6.

The third reason this Court gave in *Widmar* was that there is no good reason to protect "religious speech" only and not to protect "religious worship" under the Constitution.

> Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. *See, post* at 284-285. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, *see Heffron, supra*, than for religious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

Widmar, 454 U.S. at 269, n. 6.

This Court should grant review and reject the Ninth Circuit's unconstitutional distinction between religious services, which it allows the County to ban from the forum, and religious speech, which it permits in a concession to this Court's decisions in *Good News Club* and *Lamb's Chapel.*

Also, this Court should repudiate the conclusion that the reference to "mere religious worship" in *Good News Club* means that government may single out "mere religious worship" and exclude it from a forum broadly open to all.

II. THE NINTH CIRCUIT'S DECISION THAT A FORUM OPENED BROADLY FOR ADVOCACY IS ONLY A "LIMITED FORUM" FROM WHICH THE GOVERNMENT MAY EXCLUDE RELIGIOUS EXPRESSION CONFLICTS WITH THE RULINGS BY THE FIRST, THIRD, FOURTH, FIFTH AND EIGHTH CIRCUITS.

The Ninth Circuit also erred by broadly expanding the definition of a "limited forum," to allow the County to exclude disfavored speech under the permissive "reasonableness" test. The Ninth Circuit in essence ruled that one exclusion from a forum opened broadly to community groups constitutes only a "limited forum" and not a "designated public forum." The Ninth Circuit upheld the County's exclusion of "religious services" from its forum in the library meeting rooms opened by policy for a wide range of topics – "educational, cultural or community interest." The Ninth Circuit ruled that this broad forum was only a "limited forum," because it excluded one thing - religious services, and that exclusion passed the reasonableness test. By refusing to find that the County had created a "designated public forum," the Ninth Circuit avoided evaluating this content-based exclusion under the compelling state interest test, as *Widmar* requires.

At least five other circuits have found similar policies to create a "designated public forum," where exclusions of religious expression are content-based discrimination that must be justified by a compelling state interest.[1] This Court should grant review and reject the Ninth Circuit's distortion of the First Amendment's forum doctrine.

A. Other Circuits Have Held Unconstitutional Government Exclusion of Religious Expression From Forums Opened by Policies Similar to This One.

Contra Costa County, by policy and practice, allows community groups to meet in the meeting rooms of its library buildings for meetings, programs or activities of "educational, cultural or community interest" App.108a. The Ninth Circuit found this to be only a "limited forum," App. 15a and 22a. In contrast, this Court and at least five other circuits have found that similar policies created "designated public forums," which meant that the government entities in those cases had to justify their exclusions of religious expression under the compelling

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[1] This Court uses a forum analysis in deciding claims of access to public property for expressive activities. *See, e.g., Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 797 (1985). There are "three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 802. Traditional public fora include property traditionally open to assembly and debate, such as public streets and parks. *Id.* Designated public fora are facilities "not traditionally open to assembly and debate as a public forum" which government has "intentionally open[ed] ... for public discourse." *Id.* Examples of designated public fora include university facilities made available for meetings of student groups, *Widmar v. Vincent*, 454 U.S. 263 (1981) and school board meetings opened for citizen input, *Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). Nonpublic fora comprise property which is not by tradition or designation a forum for public communication, *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983), such as jailhouse grounds, *Adderley v. Florida*, 385 U.S. 39 (1966).

state interest test. However, with completely circular logic, the Ninth Circuit ruled that this forum is only a limited forum, because it excludes religious services, which means that the exclusion need only be reasonable and viewpoint neutral. App.15a-18a. The Ninth Circuit upheld the exclusion of religious services under the permissive "reasonableness" test, and also found the exclusion to be viewpoint neutral because it banned all religious worship. App. 19a-24a.

The Ninth Circuit's decision on the nature of the forum conflicts with this Court's decision in *Widmar v. Vincent,* 454 U.S. 263 (1981) and the Eighth Circuit's decision which *Widmar* upheld. *See Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980). *Widmar* should control the result here. The policy at issue in *Widmar* permitted students to hold meetings on campus for "political, cultural, educational, social and recreational events," but barred religious worship services, *Chess v. Widmar*, 635 F.2d at 1312. This policy is similar to the policy in this case. This Court and the Eighth Circuit both ruled the University of Missouri had created a designated public forum for students, with an unconstitutional content-based exclusion of religious worship.

The Ninth Circuit's decision here also conflicts with the First Circuit's ruling in *Grace Bible Fellowship v. Maine School Administrative District No. 5,* 941 F.2d 45 (1st Cir. 1991). (Then-Chief Judge Breyer joined the panel decision in this case). In that case, the First Circuit held that a Maine school district had created a designated public forum (941 F.2d at 47) when it opened its buildings for meetings by youth groups, community, civic and service organizations, government

agencies, educational programs, and cultural events,[2] and struck down its exclusion of religious expression from that forum. A school district in Maine rejected a local church's request to rent the high school to invite the community for a free Christmas meal because the event included prayer and religious preaching on the true meaning of Christmas. The First Circuit ruled that the school district violated the church's First Amendment rights with its policy prohibiting community groups from leasing school facilities "for the direct advancement of religion." The First Circuit called the school district's actions "censorship," 941 F.2d at 48, and an "elementary violation" of the First Amendment. *Id.*

The Ninth Circuit's ruling here also conflicts with the decision of the Third Circuit in *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990). In that case, the Third Circuit ruled that a suburban Philadelphia school district had created a designated public forum when it permitted meetings by civic groups, cultural activities, resident service organizations, adult education classes and labor unions. 907 F.2d at 1372-73. The Third Circuit ruled that the school district violated the First Amendment rights of Campus Crusade for Christ when it refused to rent its high school auditorium for a Saturday night evangelistic performance by an illusionist who preaches the Christian gospel message to the audience. The Third Circuit declared unconstitutional the policy exclusion which prohibited community groups from using school facilities "for religious service[s]." 907 F.2d at 1373.

The Ninth Circuit's ruling also conflicts with the ruling of the Fourth Circuit in *Fairfax Covenant Church v. Fairfax*

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[2] The text of the Maine school district's policy does not appear in the First Circuit's opinion, but it was in the record before that Court and is taken from the Brief of Appellees, pp. 9-10.

County School Bd., 17 F.3d 703 (4th Cir. 1994). In that case, the Fourth Circuit ruled that a school district had created a designated public forum by its policy permitting meetings by cultural, civic and educational groups, as well as political organizations. 17 F.3d at 707 (applying *Widmar* to the facts of the case). The Fourth Circuit applied the compelling state interest test and declared unconstitutional the school district's policy that required churches to pay more than nonreligious groups to rent school buildings.

The Ninth Circuit's ruling here also conflicts with the decision by the Fifth Circuit in *Concerned Women for America v. Lafayette County and Oxford, Mississippi Public Library*, 883 F.2d 32 (5th Cir. 1989). In that case, the Fifth Circuit ruled that a public library had established a designated public forum with its policy permitting meetings of a "civic, cultural or educational character." 883 F.2d at 33-34. The library's policy also expressly excluded religious expression. The Fifth Circuit found the religious exclusion violated the First Amendment when it excluded a woman's prayer group from meeting in the library's auditorium for a group prayer meeting. 883 F.2d at 34.

Additionally, at least five district courts in Nevada, Kansas, Wyoming, New York and Alabama have ruled that school districts violated the First Amendment by excluding religious worship services from public schools generally open for expressive activities by community groups:

Church worship services may not be excluded from a forum generally opened to the public:

-- *Wallace v. Washoe County School District,* 818 F.Supp. 1346 (D. Nev. 1991) (school district may not prohibit a church from meeting in a school for Sunday morning worship services because school is generally open for use by community groups).

-- *Country Hills Christian Church v. Unified School District No. 512*, 560 F.Supp. 1207 (D. Kan. 1983) (school district may not deny church access to the school's public forum so a church can hold worship services).

Private baccalaureate services may not be excluded from a forum generally opened to the public:

-- *Shumway v. Albany School District No. 1,* 826 F.Supp. 1320 (D.Wyo. 1993) (school district must open its public forum to a private baccalaureate service for the graduating seniors).

-- *Randall v. Pegan,* 765 F.Supp. 793 (W.D.N.Y. 1991) (school district must open its public forum to a privately-run baccalaureate service for the graduating seniors).

-- *Verbena United Methodist Church v. Chilton County Board of Education,* 765 F.Supp. 704 (M.D.Ala. 1991) (school district must open its public forum to a privately-run baccalaureate service for the graduating seniors).

The Second Circuit made the same error that the Ninth Circuit did in defining a "limited forum." The Second Circuit ruled in *Bronx Household of Faith* that a forum opened generally for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," is only a "limited forum." *Bronx Household,* 331 F.3d at 346 and 351. Therefore, two circuits (the Second and the Ninth) ruled that a forum like the one in this case created only a limited forum.

However, five federal circuit courts (the First, Third, Fourth, Fifth and Eighth) and five district courts have disagreed and ruled that such a policy created a designated public forum. Those courts judged the content-based exclusions against religious expression using the compelling state interest test.

Those courts ordered school districts and a public library to permit religious worship and instruction in forums created by policies very similar to the one in this case. Yet the Ninth Circuit upheld the exclusion of religious services. This Court should grant review in this case to resolve the conflict between the Ninth Circuit's decision and the cases described above, and to confirm that religious services cannot be excluded from a forum generally open to the public for expressive activity.

B. The Policy Does Not Create a Limited Forum.

This Court should grant review to correct the Ninth Circuit's distorted concept of a "limited forum." The Ninth Circuit reasoned that if the government excludes just a few categories of subject matter from a forum generally opened for all other expression, the forum is only a "limited forum," and the exclusion will be upheld if it is reasonable and viewpoint neutral. App. 19a-20a.[3] Such reasoning neutralizes this Court's

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[3] The Ninth Circuit erred when it stated that this Court in *Good News Club* "adopted the Second Circuit's conclusion that the State of New York had created a limited public forum when it made its public schools available for 'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community.'" App. 16a. In fact, this Court specifically declined to rule whether the New York state law at issue in *Good News Club* created a designated public forum or not, and simply accepted the parties' stipulation that state law created a "limited forum:" "We have previously declined to decide whether a school district's opening of its facilities pursuant to N.Y. Educ. Law § 414 creates a limited or a traditional public forum. See *Lamb's Chapel, supra,* at 391-392. Because the parties have agreed that Milford created a limited public forum when it opened its facilities in 1992, ... we need not resolve the issue here. Instead, we simply will assume that Milford operates a limited public forum." *Good News Club*, 533 U.S. at 106. In fact, this Court stated in *Lamb's Chapel* that the argument that a policy and practice like the one here creates a designated public forum "has considerable force, for the District's property is heavily used by a wide variety of private organizations." *Lamb's Chapel*, 508 U.S. at 392 (emphasis added).

forum doctrine and First Amendment protection for speakers because any exclusion of disfavored speech from the forum instantly transforms it into a mere "limited forum." The Ninth Circuit circumvents the First Amendment by allowing government to exclude any disfavored speakers or subject matter from a forum generally opened to all, and then claiming it has only a "limited forum" because it excludes some speech. The exclusions then are judged under the more lenient "reasonableness standard" rather than under the compelling state interest test.

This Court should take this case to stop the confusion or misuse of the "limited forum." This Court should state that one or a few exclusions from a forum generally opened to the public for expression does not make it a "limited forum." In order to create a genuine "limited forum," the government must limit the forum to a clear category of people (*e.g.*, students or government employees), or a clear category of subject matter (*e.g.*, the agenda before a town council meeting, or a government theater dedicated to Shakespearean-era plays only), and then exclude all other speakers and subject matters.

Judge Bybee in his dissent makes this same point by stating that there are "perfectly permissible means by which categories of speech-including worship activities-could be excluded from the library." App. 99a. He gave as examples, " if the library had set aside its meeting rooms for book clubs, it could certainly exclude every other category of expressive activity that did not fall within the purposes of the forum. The library could exclude worship services that were not book clubs, just as it could exclude political debates and city council meetings." *Id.*

This Court should grant the petition to reject specifically the notion that government creates a "limited forum" by excluding one category or a few categories of subject matter from a forum generally opened to the community for expressive activities.

CONCLUSION

For the reasons expressed above, petitioners respectfully ask this Court to grant the petition for writ of certiorari to the Ninth Circuit.

Respectfully submitted,

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June 7, 2007

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

FAITH CENTER CHURCH EVANGELISTIC MINISTRIES, a California non-profit religious corporation; Hattie Hopkins, an individual, Plaintiffs-Appellees,

v.

Federal D. GLOVER, member and Chair of the Contra Costa County Board of Supervisors; Mark Desaulnier; John M. Gioia; Millie Greenberg, members of the Contra Costa County Board of Supervisors; John W. Sweeten; Anne Cain, Contra Costa County Librarian; Patty Chan, Senior Branch Librarian for the Antioch Branch of the Contra Costa County Public Library; Laura O'Donahue, Administrative Deputy Director for the Antioch Branch of the Contra Costa County Public Library; Gayle B. Uilkema, Defendants-Appellants.

No. 05-16132.

Argued and Submitted Feb. 17, 2006.
Filed Sept. 20, 2006.
Amended March 9, 2007.

Reversed in part, vacated in part, and remanded.

Karlton, Senior District Judge, sitting by designation, filed concurring opinion.

Tallman, Circuit Judge, filed dissenting opinion.

Opinion, 462 F.3d 1194, as amended by 480 F.3d 891.

***895** Appeal from the United States District Court for the

Northern District of California; Jeffrey S. White, District Judge, Presiding. D.C. No. CV-04-03111-JSW.

Before: PAEZ and RICHARD C. TALLMAN, Circuit Judges, and LAWRENCE K. KARLTON,[FN*] Senior District Judge.

FN* The Honorable Lawrence K. Karlton, Senior United States District Judge for the Eastern District of California, sitting by designation.

OPINION

PAEZ, Circuit Judge:

***902** This appeal from the grant of a preliminary injunction involves an evangelical Christian church seeking access to a public library meeting room to conduct, among other activities, religious worship services. We are called upon to navigate between two equally important interests: the church's right to access a government building that is open to other groups, and the government's right to preserve its property for its intended uses. We conclude that the district court erred when it found that the church was likely to succeed on the merits of its First Amendment claim and therefore abused its discretion in granting preliminary injunctive relief. We have jurisdiction under 28 U.S.C. § 1292, and we reverse in part and remand.

I.

The relevant facts are not disputed. Contra Costa County ("County") makes available to the public its public library meeting rooms during operating hours. The County's goal in making these meeting rooms available is "to encourage the use

of library meeting rooms for educational, cultural and community related meetings, programs and activities." Pursuant to the County's library meeting room policy, "[n]on-profit and civic organizations, for-profit organizations, schools and governmental organizations" may use the meeting room space for "meetings, programs, or activities of educational, cultural or community interest." The County regulates use of the meeting rooms in the following ways: (1) library meeting rooms are available on a first-come, first-served ***903** basis; (2) the applicant must submit an application that identifies the applicant and purpose of the meeting; (3) access to the meeting room is contingent upon approval by the library staff, and the County library reserves the right to deny an application or revoke permission previously granted; (4) an applicant must pay a fee for use of the meeting room when a meeting is not open to the general public, when it charges an admission fee, or when it involves sales or solicitations; (5) schools may not utilize a meeting room "for instructional purposes as a regular part of the curriculum"; and (6) the library meeting room "shall not be used for religious services."

It is the last policy restriction on "Religious Use" that is the subject of this case. The "Religious Use" restriction has twice been amended since the present action was filed in the district court. Initially, the policy provided that "[l]ibrary meeting rooms shall not be used for religious purposes." In August 2004, the County modified the policy to prohibit use of library meeting rooms "for religious services or activities." On December 14, 2004, the County Board of Supervisors adopted Resolution No.2004/655, the County's current policy, to prohibit "religious services" from being conducted in library meeting rooms.

Plaintiff Faith Center Church Evangelistic Ministries is a non-profit religious corporation led by plaintiff Pastor Hattie Mae Hopkins (collectively "Faith Center"). According to Faith Center's verified amended complaint, Pastor Hopkins believes that she is called to share her Christian faith with others. Pastor Hopkins believes that there are many individuals who need to hear about the gospel of Jesus Christ but who may never enter a traditional church building. To reach those individuals, Pastor Hopkins holds meetings and worship services in non-church buildings under the auspices of Faith Center. Participants at Faith Center's meetings generally "(a) discuss educational, cultural, and community issues from a religious perspective; (b) engage in religious speech and religious worship; and (c) engage in discussing the Bible and other religious books [as well as] teaching, praying, singing, sharing testimonies, sharing meals, and discussing social and political issues."

Pastor Hopkins believes that divine providence guided her to begin holding Faith Center meetings in Antioch, California. In May 2004, Pastor Hopkins submitted applications requesting to use the County's Antioch Branch Library meeting room for May 29, 2004 and July 31, 2004. In each application, Pastor Hopkins described the purpose of Faith Center's meetings as "Prayer, Praise and Worship Open to the Public, Purpose to Teach and Encourage Salvation thru Jesus Christ and Build up Community." Pastor Hopkins received confirmation from Antioch Library staff that her applications had been approved and that Faith Center's dates were reserved on the library's calendar.

Faith Center advertised its May 29, 2004 meeting with a flyer describing a "Women of Excellence Conference" sponsored by Faith Center Evangelistic Ministries Outreach. The flyer

stated:
Coming to Antioch, California, on May 29th 2004, where the power of God would be moving to bring miracles into your life. "For this is the hour of the believer," thus saith the Lord, for divine impartation of spiritual gifts, and empowerment, for the body of Christ to move forward in total victory. Come and receive your blessing!

The flyer divided the day's activities into a "Wordshop" from 11:00 a.m. to 12:00 p.m., refreshments, and an afternoon "Praise and Worship" service with a sermon by Pastor Hopkins from 1:00 p.m. to 3:00 p.m. The topic of the morning ***904** "wordshop" was " 'The Making of an Intercessor,' an End-time call to Prayer for every Believer, and how to pray fervent, effectual Prayers that God hears and answers."

Faith Center held its meeting and service on May 29, 2004. Toward the end of the afternoon service, Antioch Library staff informed Faith Center representatives that they were not permitted to use the meeting room for religious activities. According to Faith Center, the library staff did not express concern about excessive noise but rather about a violation of the "Religious Use" policy, which, at that time, prohibited the use of library meeting rooms for "religious purposes."[1] In June 2004, the County removed Faith Center's July 31, 2004 meeting

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[1] Faith Center contends that out of consideration for library patrons, the meeting participants did not use musical instruments or amplified sound. The County explains that the Antioch Library meeting room is not sound-proof and the May 29 service could be heard outside the meeting room. The County does not argue that excessive noise was a problem.

from the Antioch Library calendar and later confirmed with Faith Center that the July meeting had been cancelled.

On July 30, 2004, Faith Center sued to enjoin the County from excluding Faith Center's proposed religious meetings on the basis of the County's "Religious Use" policy.[2] Faith Center also sought a declaration that the meeting room policy was unconstitutional on its face and as applied to Faith Center's proposed use of the meeting room.[3] Faith Center expressed a desire to hold Saturday morning meetings in the Antioch meeting room every other month.

Before the district court, Faith Center argued that the County discriminated against Faith Center on the basis of the church's viewpoint when it enforced its old policy prohibiting access to

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[2] Faith Center named as defendants Federal D. Glover (chair of the County Board of Supervisors); Mark DeSaulnier, John M. Gioia, Millie Greenberg, and Gayle B. Uilkema (members of the County Board of Supervisors); John Sweeten (County Administrator); Anne Cain (County Librarian); Patty Chan (Senior Librarian of the Antioch Branch); and Laura O'Donahue (Administrative Deputy Director of the Antioch Branch) (collectively the "County").

[3] Faith Center also alleged that enforcement of the Library policy was hostile to religion in violation of the Establishment Clause; that the Library policy was facially invalid because the County had created a designated public forum and the policy's regulation of speech was not justified by a compelling governmental interest; and that the County violated Faith Center's right to equal protection. The district court did not address these separate claims.

the meeting room for "religious purposes" and cancelled Faith Center's July 31, 2004 meeting. Faith Center also asserted that enforcement of any of the County's "Religious Use" policies, including the current one barring "religious services," would result in viewpoint discrimination in violation of the First Amendment.

The County agreed that its former meeting room policies were overly broad and that Faith Center's morning "wordshop" at the May 29th meeting was the type of religious speech activity that would be permitted under the current policy. The County, however, argued that barring Faith Center's religious worship services from the meeting room was a permissible exclusion of a category of speech meant to preserve a limited public forum for its intended uses. The County viewed Faith Center's May 29th afternoon "praise and worship" session as mere religious worship exceeding the purpose for which the meeting room forum had been created.[4]

***905** The district court granted Faith Center's motion for a preliminary injunction. *See Faith Center Church Evangelistic Ministries v. Glover,* No. 04-03111, 2005 WL 1220947 (N.D.Cal. May 23, 2005). The district court concluded that Faith Center was substantially likely to prevail on its claim that enforcement of the County's past or current library meeting room policies to exclude Faith Center's proposed religious

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[4] Although the County applied the "religious purposes" policy in existence at the time it cancelled the July 31st meeting, the County has consistently maintained that it would bar religious worship services from the library meeting room under the revised policy.

worship activities would result in unconstitutional viewpoint discrimination. The district court granted relief on the basis of Faith Center's as applied challenge.

The district court based its order on four legal premises: (1) religious worship is speech protected by the First Amendment; (2) religious worship cannot be distinguished from other forms of religious speech; (3) the exclusion of religious worship from otherwise permissible speech of a religious nature constitutes viewpoint discrimination; (4) there was no compelling Establishment Clause concern to justify Faith Center's exclusion.[5]

As the district court made clear, it proceeded on the basis that the afternoon "praise and worship" session constituted pure religious worship services.[6] Faith Center did not dispute this

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[5] In light of the district court's determination that the County discriminated against Faith Center's speech on the basis of viewpoint, the court did not address the nature of the forum created by the County's policy of opening its library meeting rooms to the public.

[6] The transcripts of the preliminary injunction hearing show that the district court understood that the afternoon session constituted pure religious worship services, even as Faith Center's other activities earlier in the day did not:
[Counsel for the County]: I have to take issue a little bit with the characterization that it is defendants who have characterized what Faith Center is doing as worship. Faith Center has characterized it that way, your honor.
The Court: I know. They are making the argument even assuming it's worship. That gets into a set of new questions.

contention because it argued that even if the afternoon session was mere religious worship, the court could not draw a constitutionally permissible distinction between afternoon worship and the rest of Faith Center's religious speech activities. Thus, as the parties do, we understand the district court's grant of preliminary injunctive relief to enjoin application of the County's policy to bar religious worship services. This appeal followed.

II.

We have jurisdiction under 28 U.S.C. § 1292. We will reverse the grant of a preliminary injunction when the district court has abused its discretion or has based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See Satava v. Lowry,* 323 F.3d 805, 810 (9th Cir.2003). Application of erroneous***906** legal principles by the district court is an abuse of discretion. *See A & M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1013 (9th Cir.2001). Underlying issues of law are reviewed *de novo,* including the claim that the

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* * *

The Court: What is your bottom line? Is your bottom line then the Court cannot issue any injunction which has the effect of precluding, as you would call it or the courts call it, mere worship in the library rooms?
[Counsel for Faith Center]: That's right, your honor.
The dissent dismisses Faith Center's representation at the preliminary injunction hearing. *See* Dissent Op., at 922-23 n. 2. However, the representation is consistent with other evidence in the record that Faith Center intended its afternoon session to consist of religious worship services. *See supra* at 903-04.

district court relied on an erroneous legal premise to arrive at its decision to grant a preliminary injunction. *See id.* Thus, we must determine "whether the court employed the appropriate legal standards governing the issuance of a preliminary injunction and whether the district court correctly apprehended the law with respect to the underlying issues in the case." *Sammartano v. First Judicial Dist. Court,* 303 F.3d 959, 965 (9th Cir.2002) (internal quotation marks and citation omitted).

II.

A preliminary injunction may issue when the moving party demonstrates either "(1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor." *A & M Records, Inc.,* 239 F.3d at 1013. "These formulations are not different tests but represent two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases." *Associated Gen. Contractors of Cal. v. Coal. for Econ. Equity,* 950 F.2d 1401, 1410, (9th Cir.1991) (internal quotation marks and citation omitted). Accordingly, "if the movant has a 100% probability of success on the merits, this alone entitles it to reversal of a district court's denial of a preliminary injunction, without regard to the balance of the hardships." *Sammartano,* 303 F.3d at 965 (internal quotation marks omitted).

Because the district court concluded that enforcement of the County's library meeting room policy was substantially likely to violate Faith Center's right to freedom of expression, the court also concluded that Faith Center had demonstrated the requisite irreparable harm. *See Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("The loss of First

Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Sammartano,* 303 F.3d at 973 ("[A] party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." (internal quotation marks and citation omitted)). We agree that the existence of a colorable First Amendment claim in this case is sufficient to demonstrate irreparable injury. We therefore confine our review to determining whether Faith Center has demonstrated a likelihood of success on the merits of its First Amendment "as applied" challenge.[7]

IV.

A.

As a preliminary matter, our inquiry ends if Faith Center's religious services do not constitute "speech" subject to First Amendment protection. We conclude that Faith Center engaged in protected speech when its participants met in the Antioch Library for prayer, praise, and worship. *See Widmar v. Vincent,* 454 U.S. 263, 269, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) ***907** ("[R]eligious worship and discussion ... are forms of speech and association protected by the First Amendment."); *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 111, 121

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[7] Because we conclude that the district court erred in granting relief on the basis of Faith Center's First Amendment as applied challenge, we need not address Faith Center's other constitutional arguments. *See supra* note 3. Upon remand, the district court may address these claims in the first instance.

S.Ct. 2093, 150 L.Ed.2d 151 (2001) (finding that activities "quintessentially religious" in nature such as religious instruction, prayer, and discussion and recitation of the Bible, are protected speech); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (finding that the presentation of cultural and educational subject matter from a religious perspective is speech protected by the First Amendment).

The Constitution, however, does not guarantee that all forms of protected speech may be heard on government property. "[T]he Government, 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.' " *Cornelius v. NAACP Legal Def. & Educ. Fund,* 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) (quoting *Greer v. Spock,* 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976)). The Supreme Court has adopted a forum analysis to balance "when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *United States v. Kokinda,* 497 U.S. 720, 726, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (internal quotation marks and citation omitted). Thus, we must at the outset determine the nature of the forum established by the County when it opened the Antioch Library meeting room to various community groups.

We begin our forum analysis by "identify[ing] the nature of the forum" and "whether the forum [at issue] is public or non-public." *Cornelius,* 473 U.S. at 797, 105 S.Ct. 3439. Forum analysis has traditionally divided government property into three categories: public fora, designated public fora, and nonpublic fora. *Di-Loreto v. Downey Unified Sch. Dist. Bd. of Educ.,* 196 F.3d 958, 964 (9th Cir.1999). Once the forum is

identified, we determine whether restrictions on speech are justified by the requisite standard. *Cornelius,* 473 U.S. at 797, 105 S.Ct. 3439.

Traditional public fora such as public streets and parks are locations that "by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). When the government intentionally dedicates its property to expressive conduct, it also creates a public forum. *Id.* Such designated public fora cannot be created by inaction; the government must "intentionally open[ ] a nontraditional forum for public discourse." *Cornelius,* 473 U.S. at 802, 105 S.Ct. 3439. The ability of the government to limit speech in a traditional or designated public forum is sharply circumscribed. Content-based regulation is justified only when "necessary to serve a compelling state interest and [when] it is narrowly drawn to achieve that end." *Perry,* 460 U.S. at 45, 103 S.Ct. 948. Content-neutral restrictions that regulate the time, place, and manner of speech are permissible so long as they are "narrowly tailored to serve a significant government interest, and[they] leave open ample alternative channels of communication." *Id.*

Any public property that is not by tradition or designation a forum for public communication is classified as a non-public forum. *See DiLoreto,* 196 F.3d at 965. Regulation of speech in a nonpublic forum is subject to less demanding judicial scrutiny. "The challenged regulation need only be reasonable, as long as the ***908** regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Int'l Soc. for Krishna Consciousness v. Lee,* 505 U.S. 672, 679, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992).

We have recognized that the Supreme Court, in decisions subsequent to *Perry* and *Cornelius,* has identified another category-the "limited public forum"-to describe a nonpublic forum that the government intentionally has opened to certain groups or for the discussion of certain topics. *See DiLoreto,* 196 F.3d at 965 (citing *Rosenberger v. Rector & Visitors of the Univ. of Virginia,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). Restrictions governing access to a limited public forum are permitted so long as they are viewpoint neutral and reasonable in light of the purpose served by the forum.[8]

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[8] We have previously noted that "[t]he contours of the terms 'designated public forum' and 'limited public forum' have not always been clear." *DiLoreto,* 196 F.3d at 965 n. 4. The terms are not interchangeable. A limited public forum is a sub-category of the designated public forum, where the government opens a nonpublic forum but reserves access to it for only certain groups or categories of speech. *Hopper v. City of Pasco,* 241 F.3d 1067, 1074-75 (9th Cir.2001). In a limited public forum, we review restrictions on speech that are viewpoint neutral for their reasonableness. Other courts follow the same practice. *See, e.g., Bowman v. White,* 444 F.3d 967, 975-76 (8th Cir.2006) (eschewing the terminology of designated or limited public forum in favor of a designated public forum classified as either of a "limited" or "unlimited" character); *Warren v. Fairfax County,* 196 F.3d 186, 193-94 (4th Cir.1999) (en banc); *Kreimer v. Bureau of Police of Morristown,* 958 F.2d 1242, 1261 & n. 21 (3d Cir.1992); *Travis v. Owego-Apalachin Sch. Dist.,* 927 F.2d 688, 692 (2d Cir.1991).

B.

We conclude that the Antioch Library meeting room is a *limited public forum and that enforcement of the County's* policy to exclude religious worship services from the meeting room is reasonable in light of the forum's purpose. It is clear, and neither party contends otherwise, that the forum created by the County is neither a traditional public forum nor a nonpublic forum. Rather, the parties dispute whether the Antioch meeting room constitutes a designated or limited public forum.

In evaluating the type of forum at issue, we look to "the policy and practice of the government, the nature of the property and its compatibility with expressive activity, and whether the forum was designed and dedicated to expressive activity." *Children of the Rosary v. City of Phoenix,* 154 F.3d 972, 976 (9th Cir.1998) (citing *Cornelius,* 473 U.S. at 802-03, 105 S.Ct. 3439); *see also Am. Civil Liberties Union of Nev. v. City of Las Vegas,* 333 F.3d 1092, 1098 (9th Cir.2003). The purpose of our inquiry is to discern the government's intent in making the forum available for public use. *See Cornelius,* 473 U.S. at 802, 105 S.Ct. 3439.

The County's library meeting room policy allows "[n]on-profit and civic organizations, for-profit organizations, schools and governmental organizations" to use a branch Library meeting room for "meetings, programs, or activities of educational, cultural or community interest." Evidently, the County's purpose was to invite the community at large to participate in use of the meeting room for expressive activity. In practice, the County has allowed a variety of community groups to hold meetings in the Antioch Library meeting room, including the Sierra Club for purposes of letter writing, Narcotics

Anonymous for a recovery meeting, and ***909** the East Contra Costa Democratic Club to "let people learn about Democratic candidates and issues."[9]

A policy with a broad purpose however is not dispositive of an intent to create a public forum by designation. In *Good News Club,* the Supreme Court adopted the Second Circuit's conclusion that the State of New York had created a limited public forum when it made its public schools available for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community." *Good News Club,* 533 U.S. at 102, 106, 121 S.Ct. 2093 (internal quotation marks omitted). Other courts have interpreted similar broadly worded policies to create limited public fora. *See Bronx Household of Faith v. Bd. of Ed. of City of New York,* 331 F.3d 342, 346 (2d Cir.2003) (recognizing that the same New York State policy at issue in *Good News Club* created a limited public forum); *Campbell v. St. Tammany Parish Sch. Bd.,* No. Civ. A. 98-2605, 2003 WL 21783317, at * 1 (E.D.La. July 30, 2003) (unpublished) (holding that school board's policy of granting access for "civic and recreational meetings ... and other uses pertaining to the welfare of the community" created a limited public forum).[10]

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[9] Faith Center offers examples of other applicants seeking access to other library meeting rooms in the County. As the district court correctly noted, however, the relevant forum is "defined by the access sought by the speaker," *DiLoreto,* 196 F.3d at 965, and in this case the forum is the Antioch Library meeting room.

[10] We have also interpreted policies with a "broad purpose" to nevertheless create a limited public forum. *See,*

Here, the County's policy and practices make clear that the County did not intend for the Antioch Library meeting room to be open for indiscriminate use. The County's policy excludes schools from using the meeting room "for instructional purposes as a regular part of the curriculum" and organizations who wish to engage in "religious services." Additionally, the policy requires a potential user to submit an application describing the intended use and identifying the applicant. Thereafter, the application must be reviewed and approved in advance by the County. Requiring prior permission for access to forum demonstrates that a public forum has not been created by designation. *See Cornelius,* 473 U.S. at 803, 105 S.Ct. 3439. Finally, the policy requires an applicant to pay a fee for certain proposed uses. By charging a fee in certain circumstances, the County has demonstrated its desire to limit access to the library meeting room for certain purposes and speakers.

The record indicates that the County has consistently applied its policy restrictions. Faith Center does not contend that the County has ever failed to screen an application or that the County has granted access to an applicant on a non-policy basis. *See Hopper,* 241 F.3d at 1076 ("[C]onsistency in application is the hallmark of any policy designed to preserve the non-public status of a forum.")

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e.g., Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1051 (9th Cir.2003) (holding that school policy to distribute flyers about summer activities that are "of interest to school-children" established a limited public forum).

The nature of the forum also supports the conclusion that, although the community at large has been invited to use the room, the library meeting room was not intended to be open for unlimited public expression. A library is quintessentially "a place dedicated to quiet, to knowledge, and to beauty," *Brown v. Louisiana,* 383 U.S. 131, 142, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); where "the worthy missions of facilitating learning and cultural enrichment"***910** are fostered, *United States v. Am. Library Ass'n,* 539 U.S. 194, 203, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003); and whose "very purpose is to aid in the acquisition of knowledge through reading, writing and quiet contemplation," *Kreimer,* 958 F.2d at 1261.

We also note that the Antioch meeting room is located within the Antioch Branch Library itself, that the meeting room is accessible during normal operating hours when other library patrons are present, and that sound can be heard by nonparticipants. Thus, while the Library meeting room is compatible with different kinds of expressive activity such as a group discussion or lecture, we are mindful that the forum was not intended to undermine the library's primary function as a venue for reading, writing, and quiet contemplation. The County's policy delineating the speakers and uses appropriate for the Library meeting room, its consistent screening of applications, and its requirement of a fee in limited circumstances, underscores our conclusion that the Antioch forum was not dedicated for indiscriminate use. We therefore hold that the Antioch Library meeting room is a limited public forum whose restrictions to access may be "based on subject matter ... so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius,* 473 U.S. at 806, 105 S.Ct. 3439. We proceed next to the question of whether the County's decision

to prohibit Faith Center from conducting religious worship services in the Library meeting room is reasonable in light of the purpose served by the forum.

C.

"[R]easonableness analysis focuses on whether the limitation is consistent with preserving the property for the purpose to which it is dedicated." *DiLoreto,* 196 F.3d at 967 (internal quotation marks omitted). Although the actual forum is a library meeting room, the nature and function of the County's public library as a whole is relevant in evaluating the reasonableness of the County's exclusions. *See id.* at 968.

The purpose of the County's library policy is to make its library meeting rooms available as a community resource for different kinds of expressive activity such as meetings, discussions, lectures, and other "meetings, programs, or activities of educational, cultural or community interest." The County's policy regulates use of the meeting room to preserve the character of the forum as a common meeting space, an alternative to the community lecture hall, the corporate board-room, or the local Starbucks. The library policy, for example, prohibits schools from using the meeting room as a regular part of the school's curriculum. The County's exclusion of schools is reasonable in light of its purpose. To allow the meeting room to be converted into a classroom would transform the character of the forum from a community meeting room to a public school.

By the same token, the County's decision to exclude Faith Center's religious worship services from the meeting room is reasonable in light of the library policy so that the Antioch forum is not transformed into an occasional house of worship.

Faith Center acknowledges that it seeks to reach out to those individuals who might not enter a traditional church building, and to bring the evangelical church experience to them. We see nothing wrong with the County excluding certain subject matter or activities that it deems inconsistent with the forum's purpose, so long as the County does not discriminate against a speaker's viewpoint. To conclude that the County's ***911** exclusion of religious worship services from its government buildings is unreasonable would result in the "remarkable proposition that any public [building] opened for civic meetings must be opened for use as a church, synagogue, or mosque." *Good News Club,* 533 U.S. at 139, 121 S.Ct. 2093 (Souter, J., dissenting).

The County also has a reasonable interest in limiting the Library meeting room to uses that could potentially interfere with the primary function of the library. In *DiLoreto,* a school district policy excluded subject matter that was deemed too sensitive or controversial from advertisements on a high school's baseball fence. 196 F.3d at 966. "The District's concerns regarding disruption and potential controversy" were found reasonable in light of the circumstance of having a limited forum (the advertisement fence) within a public secondary school. *Id.* at 968. We thus upheld the exclusion of an advertisement containing the text of the Ten Commandments because it was inconsistent with the limited purpose served by the forum.

Here too, the County has a legitimate interest in screening applications and excluding meeting room activities that may interfere with the library's primary function as a sanctuary for reading, writing, and quiet contemplation. The County reasonably could conclude that the controversy and distraction

of religious worship within the Antioch Library meeting room may alienate patrons and undermine the library's purpose of making itself available to the whole community. *See id.* We therefore conclude that the County's prohibition on religious worship services is reasonable in light of the purpose served by the Library meeting room.[11]

V.

Although the County's policy, and its decision to bar Faith Center from using the Library meeting room to conduct religious worship services, is reasonable in light of the forum's purpose, Faith Center is likely to succeed on the merits of its First Amendment claim if it can establish that the County discriminated against it because of its religious viewpoint.

In a limited public forum, the government is free to reserve access to the forum "for certain groups or for the discussion of certain topics." *Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510. Access may not be restricted, however, if the "rationale for the restriction" is the "specific motivating ideology or the opinion or perspective of the speaker." *Id.* We must identify whether the County's exclusion of Faith Center's religious worship services from the Library meeting room is "content discrimination, which may be permissible if it preserves the purpose of that limited forum, [or] viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 829-30, 115

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[11] The County, however, acknowledges that it may not bar Faith Center from using the Library meeting room to conduct activities that express a religious viewpoint on otherwise permissible subject matter.

S.Ct. 2510.

We hold that the exclusion of Faith Center's religious worship services from the Antioch Library meeting room is a permissible limitation on the subject matter that may be discussed in the meeting room, and that it is not suppression of a prohibited perspective from an otherwise permissible topic. In so holding, we address two arguments raised by Faith Center that bear directly on our analysis. First, Faith Center contends that the prohibition on religious worship services is ***912** impermissible viewpoint discrimination because "prayer, praise and worship" is an educational, cultural, and community-related activity that has been suppressed due to Faith Center's religious perspective.

Second, Faith Center argues that its religious worship cannot be distinguished from other religious speech that is permitted in the Antioch Library, and to attempt a judicially enforceable distinction would entangle the government with religion in a manner forbidden by the Establishment Clause.

A.

We first address whether the County has discriminated on the basis of content or viewpoint. "Content discrimination occurs when the government chooses the subjects that may be discussed, while viewpoint discrimination occurs when the government prohibits speech by particular speakers, thereby suppressing a particular view about a subject." *Giebel v. Sylvester,* 244 F.3d 1182, 1188 (9th Cir.2001) (internal quotation marks omitted). The distinction between regulation on the basis of subject matter or viewpoint, however, "is not a precise one," *Rosenberger,* 515 U.S. at 831, 115 S.Ct. 2510,

and as this court has recognized, "the level at which 'subject matter' is defined can control whether discrimination is held to be on the basis of content or viewpoint," *Giebel,* 244 F.3d at 1188 n. 10; *see also* Robert C. Post, *Subsidized Speech,* 106 YALE L.J. 151, 166 & n. 96 (1996).

The Supreme Court's decision in *Boos v. Barry* exemplifies the difficulty of identifying whether a regulation excludes an entire category of speech or restricts a prohibited viewpoint. 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (plurality opinion). In *Boos,* the Court reviewed a statute that prohibited the display of signs disparaging a foreign government from within 500 feet of that government's embassy. The plaintiffs argued that the statute discriminated on the basis of viewpoint because speech that favored the foreign government was permitted. From plaintiffs' standpoint, the subject matter regulated by the statute was 'speech concerning a foreign government' and the restriction improperly favored one side of the debate. The Court rejected this argument by defining the subject matter of the regulation at a different level of generality: speech against foreign governments. Because the statute excluded this entire category of speech without regard to any particular foreign government or criticism, a plurality of the Court concluded that the statute was viewpoint-neutral. *Id.* at 319, 108 S.Ct. 1157.

In *Lamb's Chapel,* the Court articulated a test for distinguishing between content and viewpoint discrimination. A religious group seeking to show a film series on child rearing from a Christian perspective was denied access to a school facility because of the school district's policy barring use of the rooms for religious purposes. The Court unanimously held that the school district "discriminate[d] on the basis of viewpoint [by] permit[ting] school property to be used for the presentation of all views about family issues and child rearing except those

dealing with the subject matter from a religious standpoint." 508 U.S. at 393, 113 S.Ct. 2141. The test is whether the government has excluded perspectives on a subject matter otherwise permitted by the forum.

The Court applied that test in *Rosenberger.* In *Rosenberger,* the Court considered whether a University of Virginia policy of excluding religious publications from eligibility for student funds was viewpoint discrimination or a content-based exclusion. The University sought to avoid a possible Establishment Clause violation by excluding***913** funding that supported "religious activity," including student publications that espoused and promoted religious beliefs. *See* 515 U.S. at 825, 115 S.Ct. 2510. The majority determined, however, that "the University [did] not exclude religion as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 831, 115 S.Ct. 2510. Because other student publications were free to discuss the topic of religion from a myriad of views other than the prohibited perspective, the University had discriminated on the basis of viewpoint. *Id.*

Most recently, in *Good News Club v. Milford Central School,* the Court held that a school district engaged in viewpoint discrimination when it refused to allow a Christian children's club ("Club") to offer a religious perspective on moral and character development in a school forum that was open to wide community involvement. The school district allowed its facilities to be used for activities "pertaining to the welfare of the community," and the facilities were available to any group that promoted the moral and character development of children. *See* 533 U.S. at 108, 121 S.Ct. 2093. Comparing the circumstances to *Lamb's Chapel,* the Court found that the

school district had discriminated on the basis of viewpoint by denying the Club the opportunity to teach moral and character development to children from a religious perspective. *See id.* at 111, 121 S.Ct. 2093 ("What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons."). Once again, the focus was on whether some other group had been permitted to engage in the same kind of speech activity from a perspective other than the prohibited one.

Good News Club is notable for two other reasons. First, the Court concluded that even activities that are "quintessentially religious" can be used to further the purpose of moral instruction and character development. In *Good News Club,* the Club taught morality and character development by singing songs, relating stories from the Bible, reciting verses, memorizing Scripture, and prayer. *See id.* at 103, 121 S.Ct. 2093. For the Court's purposes however, "[t]he only apparent difference between the activity of Lamb's Chapel and the activities of the Good News Club is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films." *Id.* at 110, 121 S.Ct. 2093.

Second, the Court drew a distinction between the Club's activities and "mere religious worship, divorced from any teaching of moral values." *Id.* at 112, 121 S.Ct. 2093 n. 4. Although the school district contended that the Club's activities constituted religious worship, the Court rejected that characterization and noted that the court of appeals made no such determination. The Court drew a line at religious worship because it did not regard worship in this case as merely

a "viewpoint from which ideas are conveyed." *Id.* To the contrary, pure religious worship held a purpose unto itself, and it exceeded the boundaries of a forum limited to a discussion of the moral and character development of children. *See id.* at 138 n. 3, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (Souter, J., dissenting).[12]

***914** Turning to Faith Center's argument, we disagree that prohibiting religious worship services in the Antioch Library meeting room constitutes viewpoint discrimination. The test, as we have articulated, is whether the government has excluded a perspective on a subject matter otherwise permitted in the forum. To determine whether "religious worship" is a perspective on an allowable topic, we are guided by the Court's approach in *Good News Club* and draw reference from events and activities that have been hosted at the Antioch meeting room forum. *See id.* at 108, 121 S.Ct. 2093.

As noted above, the County acknowledged that Faith Center's morning activities on May 29, 2004 were permissible under the County's current policy. According to Faith Center's flyer describing the day's events, the morning "Wordshop" consisted of " 'The Making of an Intercessor,' an Endtime call to Prayer for every Believer, and how to pray fervent, effectual Prayers that God hears and answers." In other words, the morning

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[12] It should be noted that Justice Scalia's concurrence embraced the position that the majority was not willing to take. Justice Scalia argued that a distinction could not be made between the Club's activities and religious worship, and that in any event, the forum could not restrict religious worship from taking place there. *See id.* at 125-26, 121 S.Ct. 2093.

workshop was devoted to the topic of communication and how to communicate effectively with one's God. Although Faith Center's activities may have included "quintessentially religious" speech such as a call to prayer, *Good News Club* makes clear that such speech in furtherance of communicating an idea from a religious point of view cannot be grounds for exclusion.

It is clear that "communication" is a permissible topic of discussion in the Antioch Library meeting room. If the Antioch Speech and Debate club applied to use the meeting room to discuss the art of oratory and effective communication of secular subjects, the County would not likely reject such a proposal. It would therefore be viewpoint discrimination for the County to exclude Faith Center's perspective on the subject of communication because of the religious content of Faith Center's speech.

Other activities that occur at Faith Center's meetings are also permissible in the Antioch meeting room. Faith Center explains that meeting participants sometimes "engage in discussing the Bible and other religious books [as well as] teaching, praying, singing, sharing testimonies, sharing meals, and discussing social and political issues." These activities convey a religious perspective on subjects that are or have been permitted in the Antioch Library meeting room, such as a discussion of the Bible, discussions of social and political issues, and sharing life experiences.[13]

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[13] Although the library meeting room policy refers to implementing rules and regulations, those rules and regulations were not a part of the district court record. We therefore refrain from commenting on the permissibility of

The County, for example, permits meetings by the East Contra Costa Democratic Club to "let people learn about Democratic candidates and issues"-in essence to discuss social and political issues from the standpoint of the Democratic Party. A Narcotics Anonymous recovery meeting includes sharing personal life experiences similar to sharing testimonials of one's personal experiences with God and faith. A letter-writing campaign by the Sierra Club involves the discussion and communication of matters of social and political interest to its members. Discussions of the Bible and other religious and literary texts are also clearly permissible in the library. Thus, to exclude Faith Center from discussing topics that are appropriate to the forum because of a prohibited religious***915** perspective would constitute viewpoint discrimination in violation of the First Amendment.

Faith Center's afternoon activities on May 29th, however, did not consist of religious viewpoint activities. Faith Center occupied the Antioch forum expressly for "praise and worship" and in doing so Faith Center exceeded the boundaries of the library's limited forum. The district court understood, and Faith Center did not dispute, the contention that the afternoon activities constituted pure religious worship services. Rather, Faith Center argued before the district court that its religious worship could not be distinguished from the rest of its religious speech, and for the court to make such a distinction was constitutionally impermissible.

Pure religious worship, however, is not a secular activity that conveys a religious viewpoint on otherwise permissible subject

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singing, eating, and drinking in the Antioch Library meeting room.

matter. For every other topic of discussion that Faith Center engages in-the Bible, communication, social and political issues, life experiences-religious and non-religious perspectives exist. The same can be said for moral and character development in *Good News Club,* child rearing in *Lamb's Chapel,* and the topic of religion itself in *Rosenberger.*

Religious worship, on the other hand, is not a viewpoint but a category of discussion within which many different religious perspectives abound. If the County had, for example, excluded from its forum religious worship services by Mennonites, then we would conclude that the County had engaged in unlawful viewpoint discrimination against the Mennonite religion. But a blanket exclusion of religious worship services from the forum is one based on the content of speech.

Faith Center contends that because a religious worship service is an "educational, cultural and community related" activity, excluding religious worship services from the forum when other community-related activities are permitted amounts to viewpoint discrimination. Although religious worship is an important institution in any community, we disagree that anything remotely community-related must therefore be granted access to the Antioch Library meeting room. That argument was rejected in *Good News Club* when the Court distinguished the Club's activities from "mere religious worship" and implicitly acknowledged that religious worship exceeded the boundaries of the limited public forum. *See Good News Club,* 533 U.S. at 112 n. 4, 121 S.Ct. 2093.[14]

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[14] It is difficult to imagine moreover that religious worship could ever truly be divorced from moral instruction or character development. That is not what the majority in

Faith Center's reliance on the Second Circuit's decision in *Bronx Household of Faith* is misplaced. In *Bronx Household of Faith,* an evangelical Christian church sought access to a public school building for Sunday meetings that consisted of singing Christian hymns, prayer, Biblical preaching and teaching, communion, and social fellowship. 331 F.3d at 347. The court concluded that, like *Good News Club,* the proposed meetings did not "constitute only religious worship, separate and apart from any teaching of moral values." *Id.* at 354. The court was guided by Justice Souter's description of the Club's activities ***916** in *Good News Club.*[15] Justice Souter characterized the Club's meetings as "an evangelical service of worship," combining teaching with "elements of worship." 533 U.S. at 138 n. 3, 121 S.Ct. 2093. The court found that the proposed meetings in *Bronx Household of Faith* were materially indistinguishable from Good News Club's activities and therefore *Good News Club* controlled the outcome of its case.

Bronx Household of Faith is inapposite because here we simply do not have "elements of worship" that further secular goals.

Good News Club meant when it wrote: "we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values." *See id.* That statement must be taken in its proper context. The defendant district opened the forum in part for the moral and character development of children. As here, pure religious worship was too tenuously associated to the forum's purpose.

[15] The court noted that the majority accepted Justice Souter's recitation of the Club's activities as accurate. *See Good News Club,* 533 U.S. at 112 n. 4, 121 S.Ct. 2093.

Faith Center's afternoon activities on May 29, 2004, as described by Faith Center itself, consisted entirely of praise and religious worship. The Second Circuit made clear that its "ruling [was] confined to the district court's finding that the [church's] activities ... [were] not simply religious worship, divorced from any teaching of moral values or other activities permitted in the forum." 331 F.3d at 354. *Bronx Household of Faith* is also distinguishable because of the nature of the forum. There, the church sought to rent empty school rooms for its Sunday meetings away from other public activity. The Antioch Library meeting room, on the other hand, is in the Antioch Branch Library and is available only during the Library's operating hours when other library patrons are present. The propriety of religious worship services varies by the different circumstances of each forum.[16]

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[16] Indeed, the unique factual circumstances of the County's limited forum set this case apart from the cases primarily relied upon by Faith Center to demonstrate the existence of viewpoint discrimination. *See, e.g., Good News Club,* 533 U.S. at 103, 121 S.Ct. 2093; *Lamb's Chapel,* 508 U.S. at 386, 113 S.Ct. 2141; *Bronx Household of Faith,* 331 F.3d at 345; *Campbell,* 2003 WL 21783317 at * 1. In *Concerned Women for America v. Lafayette County,* 883 F.2d 32, 33 (5th Cir.1989), the plaintiffs sought access to an *auditorium* rather than a meeting room at a public library. *Cf. Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 555, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (municipal auditorium was a public forum whose size and design made it conducive for expressive conduct).

B.

We turn to Faith Center's second argument, that the prohibition on religious services in the Antioch forum is viewpoint discrimination because religious worship cannot be distinguished from other permissible forms of religious speech. According to Faith Center, to enforce such a distinction, would entangle the government with religion in a manner forbidden by the Establishment Clause.

Faith Center relies on *Widmar v. Vincent* for support. In *Widmar,* a religious student organization sought access to state university facilities for religious worship and discussion. The University made its facilities available for activities by registered student groups but prohibited the use of University buildings "for purposes of religious worship or religious teaching." 454 U.S. at 265, 102 S.Ct. 269. The Court held that the University had created a public forum and therefore it could only "justify discriminatory exclusion from a public forum based on the religious content of the group's intended speech" by showing that its regulation was necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Id.* at 269-70, 102 S.Ct. 269. The University regulation did not survive under the heightened judicial scrutiny.

In dicta that was not central to the Court's holding, Justice Powell discussed the difficulty he had with the dissent's ***917** contention that a distinction should be made between religious worship and other kinds of religious speech:
First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," cease to be "singing, teaching, and reading"-all apparently

forms of "speech," despite their religious subject matter-and become unprotected worship.

Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction would require the university-and ultimately the courts-to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

Id. at 269, 102 S.Ct. 269 n. 6 (internal citations omitted).Faith Center echoes the same arguments. Faith Center asks how the County, or courts for that matter, can draw a line between permissible components of religious speech-singing, sharing testimonials, even prayer in the context of discussing how to communicate with God-and impermissible religious worship. Further, Faith Center argues that the government and courts are not competent to identify when certain expressive activity is religious worship. To enforce such a distinction would foster an excessive government entanglement with religion. *See Lemon v. Kurtzman,* 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

As Justice Scalia noted in *Good News Club,* however, "[w]e *have* drawn a different distinction-between religious speech generally and speech about religion-but only with regard to restrictions the State must place on its own speech, where pervasive state monitoring is unproblematic." 533 U.S. at 126 n. 3, 121 S.Ct. 2093. School officials routinely draw such distinctions in public schools where the subject of religion may be taught but religious speech is barred from the government speaker. *See Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290,

120 S.Ct. 2266, 147 L.Ed.2d 295 (2000); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (1994). The distinction to limit certain kinds of religious speech is also made for government employees in the workplace. *See Berry v. Dep't of Soc. Serv.*, 447 F.3d 642, 655 (9th Cir.2006) ("Permitting appellants to evangelize while providing services to clients would jeopardize the state's ability to provide services in a religion-neutral matter." (internal citation omitted)).

We also have recognized that school officials may draw a distinction between different kinds of *private* religious speech in order to preserve the intended purpose of a limited public forum. In *Hills*, the court held that a school district's policy to distribute summer camp brochures to students could not exclude a brochure that advertised for a religious summer camp. *See* 329 F.3d at 1051. The court noted, however, that the school district "is not obligated to distribute material that, in the guise of announcing an event, contains direct exhortations to religious observance; this exceeds the purpose of the forum the District created." *Id.* at 1053. We have elsewhere endorsed the principle that the government can distinguish and exclude proselytizing religious speech to preserve the purpose for a limited forum. *See, e.g., Prince v. Jacoby*, 303 F.3d 1074, 1086-87 (9th Cir.2002) (finding that while student ***918** religious group must be given equal access to school's public address system to announce its activities, the group may be barred from doing so to "pray and proselytize"); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 980 (9th Cir.2003) (permitting discussion of religious beliefs in a high school graduation speech but prohibiting "proselytizing"); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1104 (9th Cir.2000) (upholding school district's refusal to allow valedictorian to give a "sectarian, proselytizing speech" at

graduation ceremonies).[17]

This case differs from the aforementioned cases in that the County may not exclude proselytizing speech from the Antioch forum if that speech helps to convey a viewpoint about an otherwise appropriate topic. For example, Faith Center's morning "Wordshop" includes a call to prayer-speech that may be properly characterized as proselytizing. Nonetheless, because this proselytizing activity also furthers the discussion about communication and communicating with a higher authority, it cannot be grounds for exclusion.

The distinction to be drawn here is thus much more challenging-one between religious worship and virtually all other forms of religious speech-and one that the government and the courts are not competent to make. That distinction, however, was already made by Faith Center itself when it separated its afternoon religious worship service from its morning activities. Faith Center admits that it occupied the Antioch forum in the afternoon of May 29, 2004 expressly for "praise and worship." The County may not be able to identify whether Faith Center has engaged in pure religious worship,

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[17] The United States, as *amicus curiae* in support of Faith Center, argues that these school cases are distinguishable because they involve religious speech broadcast to a captive audience. We agree that the government may be justified in excluding proselytizing speech from its limited fora. The point remains, however, that the government is capable of identifying proselytizing religious speech or speech that simply has aspects of religious worship.

but Faith Center can and did.[18]

VI

We therefore conclude that prohibiting Faith Center's religious worship services from the Antioch meeting room is a permissible exclusion of a category of speech that is meant to preserve the purpose behind the limited public forum. Religious worship services can be distinguished from other forms of religious speech by the adherents themselves. Because the district court erred in enjoining the County from applying its library meeting room policy to exclude Faith Center's religious worship services, we reverse the injunction in part.

The County, however, acknowledged that its prohibition on religious worship services could not be applied to bar Faith Center from engaging in secular activities that express a religious viewpoint. Indeed, the County informed the district court that Faith Center's morning "wordshop" on May 29, 2004 was a permissible activity even though its purpose was to teach people how to pray or communicate with a divine presence. To that end, the County invited the district court to craft an injunction that ensured Faith Center's right to conduct activities

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[18] The dissent raises the specter of inevitable government entanglement when a County librarian encounters some future applicant who is less than candid about its religious worship activities. *See* Dissent Op. at 925-26. We need not speculate about those possibilities. On the limited evidentiary record and in light of the procedural posture of this case, we decide only that which is before us.

in the *919 meeting room that express a religious viewpoint, and allowed the County to exclude religious worship services. We note that the County offered several proposals for crafting a preliminary injunction that would achieve these balancing objectives and avoid the pitfalls of excessive government entanglement.[19] The district court, however, did not consider the County's suggestion regarding the scope of the injunction. We therefore vacate and remand so that the district court can craft an appropriate injunction after soliciting the views of the parties.

REVERSED in part, VACATED in part, and REMANDED for further proceedings.[20]

KARLTON, Senior District Judge, Concurring:

I concur in Judge Paez's well-reasoned opinion, which reflects the sorry state of the law. I write separately to express

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[19] At the preliminary injunction hearing, the County proposed that its meeting room application be altered to include a certification by the applicant that the meeting room will not be used for religious services. The County elaborated that a certification would allow it to rely on the honesty of the applicant while avoiding any potential issues of entanglement. We express no opinion on the merits of such a proposal.

[20] In light of our conclusions, we need not address whether the County has a necessary and compelling interest in excluding religious worship services from its library meeting rooms to avoid a violation of the Establishment Clause.

my dismay at that sorry state.

This should be a simple case it asks whether the county can be forced to subsidize a religious organization's prayer meetings by requiring it to provide the religious organization with a free place to worship. A quick reading of the First Amendment to the Constitution of the United States should answer the question. Judge Paez's opinion tracks the cases and reaches its laborious result because the law has so elaborated that the reaching of the conclusion requires the effort the opinion demonstrates. As I now explain, that elaboration is premised on a failure to accept the plain meaning of the First Amendment.

Both *Good News Club v. Milford Cen. Sch.*, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001) and *Lambs Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), turn on the High Court's purported inability to distinguish between a sermon and a speech. That distinction, however, is compelled by the First Amendment, which establishes different standards relative to government action concerning speech and government action concerning religion. The purported inability of the High Court to adhere to the distinction embodied in the First Amendment leads it to conclude that the issues tendered by cases, such as the one at bar, implicate viewpoint discrimination under the free speech provisions of the First Amendment. They simply do not. As the First Amendment notes, religious speech is categorically different than secular speech and is subject to analysis under the Establishment and Free Exercise Clause without regard to the jurisprudence of free speech.

Those, like myself, who advocate adherence to the strictures of the Establishment Clause, do so not out of hostility towards

religion. *See McCollum v. Board of Education,* 333 U.S. 203, 211-12, 68 S.Ct. 461, 92 L.Ed. 649 (1948); *Engel v. Vitale,* 370 U.S. 421, 433-34, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). Rather, we are motivated by recognition of the passions that deeply-held religious views engender, and the serious***920** threat of marrying those passions to government power. *Engel,* 370 U.S. at 431-32, 82 S.Ct. 1261 ("Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.").

That threat is not merely historic. One need only look about the world to see that danger in play. The scenario is the same whether it is in Northern Ireland where Catholics and Protestants kill each other in an effort to establish governmental power, in Israel, where Jews and Muslims do the same, in Iraq, where Shi'a and Sunni are engaged in similar slaughter, or in Sudan where Muslims murder Christians. *See School District of Abington v. Schempp,* 374 U.S. 203, 219, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). Nor is that the only danger.

Where government plays a role in the religious life of a pluralist society, there is the danger that government will favor the majority religion and seek to control or prohibit the rites of minority religions. *See Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal,* 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). Such favor can only lead to alienation and social unrest.

The wall of separation between church and state that Thomas

Jefferson thought the First Amendment raised, in no way prejudices the practice of anyone's religion. *Everson v. Board of Ed.,* 330 U.S. 1, 15-16, 67 S.Ct. 504, 91 L.Ed. 711 (1947). Instead, it serves the salutary purpose of insulating civil society from the excesses of the zealous. *See id.* at 53-54, 67 S.Ct. 504 (J. Rutledge, dissenting). The *Good News Club* and *Lamb's Chapel* majorities' disdain of the Jefferson model is premised on the belief that religious values enhance rather than endanger society. The legal issue, however, is different. It asks whether one can distinguish between religious speech in a categorical way, and the answer is yes. Of course there may be close cases. Such cases require the development of a delicate jurisprudence designed to protect the Establishment Clause while insulating religious practice from government intrusion.

In any event it is simply beyond cavil that the instant case does not present a close question. Appellees have been completely candid in acknowledging that the purpose of the meetings they proposed to hold on public property is "Prayer, Praise and Worship Open to [the] Public, Purpose to Teach and Encourage Salvation thru Jesus Christ and Build Up Commun[ity]." To assert an inability to conclude that purpose is religious in every sense, is to engage in the kind of sophistry that gives the law a bad name. It may be that the majority of the Supreme Court really has doubt about the ability to distinguish between religious practice and secular speech. If so, they need only leave their chambers, go out in the street and ask the first person they meet whether in the instant case the conduct is religious in character. It is simply untenable to insist that there is no difference between a prayer and e.g. political speech. To coin a phrase, one can only pray for the court's enlightenment.

While I believe that Thomas Jefferson has the better end of the

debate, that belief is irrelevant. I concur in the opinion because, as a subordinate judge, it is my duty to adhere to the precedent of the Supreme Court "no matter how misguided." *Hutto v. Davis,* 454 U.S. 370, 374, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982).

***921** TALLMAN, Circuit Judge, dissenting:

The "Religious Use" exclusion is impermissible viewpoint discrimination because Contra Costa County (the "County") opened its public meeting room at the Antioch Library to the community in order "to encourage [its use] for educational, cultural and community related meetings, programs and activities."[1] Notwithstanding the broad and inclusive policy it approved, the County has unlawfully excluded certain members of the community from engaging in activities that fall squarely

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[1] The policy at issue has twice been amended while this litigation was pending, *Faith Center Church Evangelistic Ministries v. Glover,* 2005 WL 1220947, at *1 (N.D.Cal. May 23, 2005), and, as modified by the Board of Supervisors of Contra Costa County, California, on December 14, 2004, now reads in relevant part:

Contra Costa County Library Policy for the Use of Meeting Rooms in Libraries

It is the policy of the Contra Costa County Library to encourage the use of library meeting rooms for educational, cultural and community related meetings, programs, and activities.

* * *

RELIGIOUS USE Library meeting rooms shall not be used for religious services.

RESOLUTION NO.2004/655 (Contra Costa County Bd. of Supervisors).

within the policy's scope by examining the way an applicant's viewpoints are expressed. Political organizations like the local Democratic Party are admitted. Religious groups are not.

The County draws an arbitrary line in the sand, arguing that it has the right to decide what constitutes a religious service while failing to set forth specific guidelines defining the term. It contends that the Establishment Clause of the First Amendment requires County officials to exclude those who wish to engage in worship behind the closed doors of its library meeting rooms. My colleagues in the majority accept the County's skewed view of the First Amendment by upholding a policy which on its face and as applied produces the very entanglement the County ostensibly seeks to avoid, and in doing so the court creates a conflict with the Second Circuit and contradicts Supreme Court precedent. I respectfully dissent.

I

"[R]eligious worship and discussion ... are forms of speech and association protected by the First Amendment." *Widmar v. Vincent,* 454 U.S. 263, 269, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Id.* at 267-68, 102 S.Ct. 269. Both parties agree that religious activities, including worship, are speech protected by the First Amendment. However, the County adopts the views of Justice Stevens, dissenting in *Good News Club v. Milford Central School,* 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001), when it argues that religious service or worship may be parsed from other religious speech-that religious worship is a category wholly separate from general religious speech. *See id.* at 130,

121 S.Ct. 2093 (Stevens, J., dissenting). According to the County, allowing religious services in its library meeting rooms would "start[ ] the courts down a slippery slope whereby all public buildings will be converted into houses of worship for the conduct of religious services." *Id.* at 139, 121 S.Ct. 2093 (Souter, J., dissenting).

As support for its assertion, the County cites two Supreme Court cases, a Second Circuit case, and an Eastern District of Louisiana case, none of which address whether mere religious worship should or could be parsed from other types of religious***922** speech. *See Good News Club,* 533 U.S. at 112 n. 4, 121 S.Ct. 2093 (concluding that a religious club's activities "[did] not constitute mere religious worship, divorced from any teaching of moral values," and therefore the parsing issue was not reached); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384, 388 n. 2, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (noting that the petitioner church did not challenge a school district's denial to use a high school for Sunday services, so the validity of that denial was not before the court); *Bronx Household of Faith v. Board of Educ. of the City of New York,* 331 F.3d 342, 355 (2d Cir.2003) (declining to address whether religious worship is a distinct type of activity separate from other religious speech); and *Campbell v. St. Tammany Parish Sch. Bd.,* 2003 WL 21783317, at *9 (E.D.La July 30, 2003) (declining to reach the issue of whether "mere religious worship" could be precluded from a particular forum).

Faith Center agrees that its meetings contain religious worship, and my colleagues find comfort in the fact that Faith Center explicitly listed worship activities on flyers for the meeting. But words on a flyer make no difference in the disposition of

this case. The next religious group wishing to intermingle worship activities, admonished as to the consequences of such advertising, may not be so explicit about its meeting itinerary, or may simply call its worship activities religious "proselytizing," an acceptable form of speech under the policy according to the court. Maj. Op. at 917-18. Regardless of what Faith Center chooses to print on its flyers, or what it chooses to call its activities, worship cannot logically be parsed from all other forms of religious expression in the way the County intends.

When compared to similar cases, such as *Bronx Household* and *Campbell,* where private religious groups conducted religious services in a government-owned forum, Faith Center's service cannot properly be described as "mere religious worship, divorced from any teaching of moral values." *See Bronx Household,* 331 F.3d at 346-48, 354 (affirming a preliminary injunction allowing a religious group equal access to public school classrooms after hours where the group's religious services could not be separated from a teaching of moral values); *Campbell,* 2003 WL 21783317, at *1-3, 9 (granting summary judgment to a religious group that wished to use a public school after hours, opened as a limited forum, for its quintessentially religious activities). Nor is it correct to say that Faith Center agreed its worship activities fall under the ambiguous, undefined category acknowledged by the Supreme Court as mere religious worship.[2]

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[2] My colleagues point to one quote during the preliminary injunction hearing in which Faith Center seemingly agreed that its activities constitute "mere worship."

The [c]ourt: What is your bottom line? Is your bottom line

***923 A**

Although the Second Circuit in *Bronx Household* declined to answer the question whether religious worship may be parsed from other religious speech, the court was concerned as to how the judiciary or any government official could validly make the distinction. *See* 331 F.3d at 355 ("Would we be able to identify a form of religious worship that is divorced from the teaching of moral values?"). The court noted the dichotomy suggested by the Supreme Court in *Good News Club* between "mere" religious worship on the one hand and "worship that is not divorced from the teaching of moral values on the other." *Id.* "Further," the Second Circuit asked, "how would the state,

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then the [c]ourt cannot issue any injunction which has the effect of precluding, as you would call it or the courts call it, mere worship in the library rooms?
[Counsel for Faith Center]: That's right, your honor.
This agreement does not bind Faith Center's activities to the Supreme Court's concept of "mere religious worship, divorced from any teaching of moral values" as noted in *Good News Club,* 533 U.S. at 112 n. 4, 121 S.Ct. 2093. Not even the district court understood Faith Center's agreement as comporting with *Good News Club's* definition of "mere religious worship," as it correctly determined in its order granting the preliminary injunction that this case "presents a factual situation similar to the factual situations presented in the *Good News Club, Lamb's Chapel, Bronx Household of Faith,* and *Campbell* cases," which each held that the activities at issue were not religious worship devoid of discussion on otherwise permissible secular subjects. *Faith Center Church,* 2005 WL 1220947, at *7.

without imposing its own views on religion, define which values are morally acceptable and which are not?" *Id.* This is the point of eschewing government decision-making based on the viewpoint at issue in the First Amendment Establishment Clause arena.

Here, the district court relied heavily, and properly so, on *Widmar* and *Bronx Household* for its conclusion that religious worship may not be parsed from other religious speech. *Faith Center Church,* 2005 WL 1220947, at *5. The County attempts to distinguish *Widmar* by arguing that the Supreme Court's comments about religious worship apply only to "open" forums, such as the forum in *Widmar.* However, the *Widmar* Court's analysis of "religious worship" was not based on the characteristics of the forum at issue, but the difficulty the government and the courts would have in drawing the line between religious worship and other religious speech:

> There is no indication when "singing hymns, reading scripture, and teaching biblical principles" ... cease to be "singing, teaching, and reading"-all apparently forms of "speech," despite their religious subject matter-and become unprotected "worship."
>
> [E]ven if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction would require [the government]-and ultimately the courts-to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the [government] with religion in a manner forbidden by our cases.

Widmar, 454 U.S. at 269 n. 6, 102 S.Ct. 269(citations omitted).

The majority opinion here cites several cases where the Supreme Court has drawn a distinction between general religious speech and speech about religion. Maj. Op. at 917-18. These cases involve speech before students at public schools and speech by government employees in the workplace. However, not only do the cited cases involve evangelical speech to a captive audience, but they are also instances where even proselytizing may be excluded. *No* amount of general religious speech is allowed in public schools or government workplaces during the business day if it is evangelical in design. Speech *about* religion is permissible in such limited fora where the purpose of the forum is very specific-school is for academic learning and the workplace is for work.

The Antioch Library opened its meeting room for a much broader purpose. My colleagues concede that evangelical speech is permissible under the "Religious Use" exclusion if it conveys a viewpoint on an otherwise permissible topic, and acknowledge***924** that the distinction the County must draw here is more subtle than in any of the cases the opinion cites. Maj. Op. at 917-18. But that is as far as the opinion goes in this analysis. It does not attempt to answer the insoluble riddle of how the County could parse religious speech which conveys a viewpoint on an otherwise permissible topic with *mere* religious worship that is impermissible speech according to the court. Instead, it claims that Faith Center has solved the riddle for us since Faith Center specifically calls its activities "worship." Under this reasoning, if Faith Center says what it is doing is worship, then the County need not make the distinction.

But this flawed analysis blithely ignores other similarly situated religious groups that may not make such a nice

admission to the County in their applications to use the room. While the district court granted the preliminary injunction based on Faith Center's "as applied" challenge to the policy, Faith Center also brought a facial challenge to the policy. Ignoring the preliminary injunction's mandate that the County open its library meeting room to any "similarly situated individual or entity" may provide a neat literal shorthand allowing my colleagues to bypass the need for parsing religious worship from other religious speech in this specific instance. However, the majority's reasoning ignores the plain reality that some County official must make the call with no articulated standard to guide a determination of what constitutes "religious services" under the policy.

Announcing the strange rule that "[r]eligious worship services can be distinguished from other forms of religious speech by the adherents themselves," Maj. Op. at 918, creates a system whereby the applicant itself decides what constitutes worship. Under the policy, the County will still have to determine what is and what is not religious worship in instances where a group does not identify in such detail its activity, and the County is not off the hook even if a group does say it will engage in religious worship. Creative wordplay cannot avoid the reality that worship is intangible, and even what Faith Center itself determines is religious worship may not be worship to another. *See Bronx Household,* 331 F.3d at 354-55 (finding "no principled basis upon which to distinguish [such] activities").

The County chooses to exclude Faith Center because it believes that allowing religious worship within its library meeting room violates the Establishment Clause. It contends that patrons would then perceive the County to endorse a particular religion. Given the County's position, our court's newly created rule is nonsensical because the religious groups that the County claims

will cause it to violate the Establishment Clause are the ones who would decide what speech constitutes a violation of the policy. I doubt the County had such a rule in mind when it created its "Religious Use" exclusion. The truth is that neither the County nor Faith Center can validly parse religious worship from religious speech under the County's broad and undefined policy.

B

Any attempt by the County to parse religious worship from other religious speech would trigger the inherent Establishment Clause entanglement problems it seeks to avoid. Justice Souter, in his dissenting opinion to *Good News Club,* described the religious activities in *Good News Club* as including elements of worship, such as prayer, a "challenge" that invited "saved" children to ask God for strength, and an "invitation" that asked "unsaved" children to receive Jesus Christ as their Savior from sin. ***925**533 U.S. at 137- 38, 121 S.Ct. 2093 (Souter, J., dissenting). The majority in *Good News Club* agreed with Justice Souter's recitation of the elements of the religious activities at issue, but decided that these activities do not constitute mere religious worship. *Id.* at 112, 121 S.Ct. 2093 n. 4.[3]

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[3] Although *Widmar* and *Good News Club* address this issue in dicta, it is essential to note that there is no such extensive Supreme Court dicta for the proposition that religious worship may be parsed from other religious speech in the context of a private group conducting meetings in places otherwise open to the public under a broad policy such as this one. The caselaw suggests the Court is clearly moving away from that notion and towards the principle that

Faith Center's religious service consists of prayer, praise, and a sermon, consistent with the type of worship in *Good News Club.* Faith Center's worship activities include discussion of moral character and other secular subjects-well within the policy's scope, and not *mere* religious worship, which has yet to be adequately defined by any court. In order to divorce prohibited religious services from other permissible religious activities to be conducted in the meeting room, the County would need to define what constitutes mere religious worship, as well as how many secular topics are required to be discussed or contemplated before mere religious worship becomes something more. I wish the County the best of luck in that drafting endeavor.

Justice Scalia, in a concurring opinion to *Good News Club,* examined our ability to distinguish religious worship from other religious speech. He concluded that the distinction between worship and other religious speech has "no intelligible content" and no "relevance" to the constitutional issue. *Good News Club,* 533 U.S. at 126, 121 S.Ct. 2093 (Scalia, J., concurring) (quoting *Widmar,* 454 U.S. at 269 n. 6, 102 S.Ct. 269). Justice Scalia noted that the difficulty of distinction is proven by the inability of the Justices to agree on what category of religious speech was at issue in *Good News Club. Id.* at 126-27, 121 S.Ct. 2093 (Scalia, J., concurring). He then added that "applying the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable." *Id.* at 127, 121 S.Ct. 2093 (Scalia, J., concurring).

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religious worship in this context cannot be distinguished from other religious speech.

There are as many ways to conduct "religious services" as there are religions in the world, not accounting for different sects of the same religion. The Supreme Court has said that the government "would risk greater entanglement by attempting to enforce its exclusion of religious worship." *Widmar*, 454 U.S. at 272 n. 11, 102 S.Ct. 269 (quotation marks and citation omitted). The government "would need to determine which words and activities fall within religious worship" and "[t]his ... could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *Id.* (quotation marks and citation omitted). The County cannot validly parse religious worship from other religious speech in trying to apply this policy without engaging in the very action it is trying to prevent-entangling itself in religion in a manner that violates the First Amendment.

C

Even if we were to ignore the inherent entanglement the exclusion would cause, the exclusionary portion of the policy is nonetheless facially invalid. While the County excludes religious services in its library meeting rooms, it does not define "religious services." How can a County ***926** librarian validly parse religious worship from allowable religious speech when the librarian does not have the proper guidelines by which he or she may recognize the offending conduct?[4]

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[4] The Board of Supervisors did not even try to define the term "religious services" in the policy it enacted by resolution. Instead, it provided, "[t]he County Librarian shall promulgate rules for the implementation of this policy." RESOLUTION NO.2004/655. No such rules have ever been brought to our attention in this litigation and we must

The opinion never addresses what the County would do if another group were to conduct worship services without delineating its activities on a flyer. Are we then to accept that a librarian will know worship when he or she sees it? Are we now to declare that the County's librarians are experts in theology and world religion? Perhaps they might consult the books on the shelves of their libraries. Or are we only excluding traditional Christian worship because that is what is most familiar to the officials in Contra Costa County? Under the policy before us, the power to decide the definition of a religious service lies squarely in the lap of government officials, and that is the crux of the problem.

Separating religious worship from other religious speech inevitably leads to state entanglement in religion that would not otherwise exist should private religious groups be allowed the freedom to conduct activities consistent with the goal of the policy, given reasonable time, place, and manner restrictions also imposed on all other groups wishing to use the public library meeting room. *See Widmar,* 454 U.S. at 278, 102 S.Ct. 269 (noting that the government's opening of its property to various forms of speech may "establish reasonable time, place, and manner regulations"). Religious worship is the expression of beliefs, convictions, viewpoints, and morality, and its means of practice are as diverse as the people who make up this nation. No government official has the ability to decide the constitution of religious worship. Any attempt would inevitably entangle the official in the Bill of Rights.

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assume that their absence from the record is not an oversight by County counsel.

II

The majority opinion not only ignores the obvious state entanglement problems the exclusion of worship presents, but it also holds that religious services cannot include speech which expresses viewpoints on otherwise secular subject matter, a conclusion contrary to the weight of Supreme Court authority. My court agrees with the County that the exclusion is content based and viewpoint neutral. Because my colleagues conclude the County has created a limited public forum,[5] the opinion holds that the content-based exclusion is permissible.

Based on its argument that religious worship may be parsed from other religious speech, the County contends that the policy excludes a whole category of speech with a distinct content, apparently believing that all religious worship speaks of the same subject matter and contains no particular*927 viewpoint on otherwise permissible secular topics. I disagree. The speech at issue here may include discussion of religious viewpoints on a variety of otherwise includible subjects, and to exclude this speech would be classic viewpoint discrimination.

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[5] I do not agree that the County opened a limited public forum, thus allowing content-based discrimination. This case is similar to *Concerned Women for America, Inc. v. Lafayette County,* 883 F.2d 32 (5th Cir.1989), in which the Fifth Circuit held that a library auditorium was a designated public forum when it was opened for organizations of a "civic, cultural or educational character," yet excluded religious or political groups. *Id.* at 33-34. However, because I believe that the "Religious Use" exclusion constitutes viewpoint discrimination, which is forbidden in all forums, I decline to address this issue further.

"Viewpoint discrimination is a form of content discrimination in which 'the government targets not subject matter, but particular views taken by speakers on a subject.' " *Children of the Rosary v. City of Phoenix,* 154 F.3d 972, 980 (9th Cir.1998) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum ... or if he is not a member of the class of speakers for whose especial benefit the forum was created ..., the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Lamb's Chapel, 508 U.S. at 394, 113 S.Ct. 2141 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)) (alterations omitted).

The Supreme Court in *Good News Club* saw "no reason to treat the ... use of religion as something other than a viewpoint merely because of any evangelical message it conveys." 533 U.S. at 112 n. 4, 121 S.Ct. 2093. "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Id.* (quoting *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). Common sense dictates that religious worship can include exploration of secular topics from a religious point of view, as Faith Center's meeting demonstrates. Enforcing the exclusion is therefore viewpoint discrimination and Faith Center has made a clear showing of probable success on the merits of its claim.

A

The County argues that the exclusion "is directed to a distinct type of subject matter and separate category of speech, not a particular religious 'viewpoint' on an otherwise permissible subject." It represents its prohibition as "permissible content-based restrictions" which, for example, "exclude speech based on topic, such as politics or religion, regardless of the particular stand the speaker takes on the topic." *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 969 (9th Cir.1999). The County's argument is based on the erroneous belief that religious service may be parsed from other religious speech, and that "religious services" is a category of speech unto itself, and therefore qualifies as a whole topic of speech that is excludable under content-based discrimination.

First, as previously stated, the notion that religious worship may be parsed from other religious speech ignores the weight of Supreme Court authority against it. *See supra* § I. Second, even if the County were somehow able to parse religious worship from other religious speech, and all religious worship is treated alike under the exclusion, the County does not explain why religious services cannot include religious viewpoints on permissible subjects. *See Lamb's Chapel,* 508 U.S. at 393, 113 S.Ct. 2141 (rejecting the Second Circuit's determination that a policy is viewpoint neutral because all religions and all uses for religious purposes are treated alike).

Faith Center's religious service consists of singing songs, engaging in prayer, and sermons about community and moral character***928** from a Biblical viewpoint. Community and moral character are two secular subjects that would be includable under the policy's broad scope. Yet the County and

my colleagues assert that Faith Center's worship cannot express a viewpoint because of the *way* ideas are communicated-through prayer and sermon.

As an example of what it deems to be the distinction between subject matter and viewpoint discrimination, the County argues that "true viewpoint discrimination ... would occur if the County permitted Christian or Buddhist religious services but disallowed Muslim or Jewish services." However, the County must therefore assume all religious services, regardless of denomination, do not communicate ideas on topics that are permissible under the policy, such as moral character. The "exclusion of several views ... is just as offensive to the First Amendment as exclusion of only one." *Rosenberger,* 515 U.S. at 831, 115 S.Ct. 2510.

B

The religious service portion of Faith Center's meeting is not unlike the services at issue in *Bronx Household* and *Campbell,* which were not mere religious worship. The Eastern District of Louisiana in *Campbell* noted that "[i]t is difficult to imagine any religious service, no matter how traditional or nontraditional that does not include sermons, homilies or lessons directed at moral and ethical conduct or how one should live one's life." 2003 WL 21783317, at *9. The Second Circuit in *Bronx Household* concluded that even the "quintessentially religious" services at issue were not "only religious worship, separate and apart from any teaching of moral values." 331 F.3d at 354 (citing *Good News Club,* 533 U.S. at 112 n. 4, 121 S.Ct. 2093). Both cases were decided within the framework of *Good News Club,* where the Supreme Court disagreed with the suggestion that something quintessentially religious or decidedly religious in nature

"cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint." 533 U.S. at 111, 121 S.Ct. 2093.

Although my colleagues take pains to distinguish it, *Bronx Household* parallels this case in many ways and is instructive on the interpretation of the precedent set by *Good News Club.* The Bronx Household of Faith applied to rent space in a public school in New York for Sunday morning meetings that included, at least in part, activities that can fairly be described as religious worship. *Bronx Household,* 331 F.3d at 345. The New York City Board of Education issued a policy similar to the one in this case, allowing community groups to meet in school classrooms after hours for "social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." *Id.* at 348. The church group characterized its meeting as a "service consist[ing] of the singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies and social fellowship among the church members." *Id.* at 347. Bronx Household filed a motion for a preliminary injunction to enjoin the Board of Education from enforcing its policy prohibiting "religious services or religious instruction" at the school after hours. *Id.* at 346. The district court granted the preliminary injunction and the Second Circuit affirmed. *Id.* at 348, 357.

The Second Circuit concluded that, after *Good News Club,* the district court did not abuse its discretion in determining that Bronx Household was substantially likely to establish that the Board of Education violated its First Amendment free speech ***929** rights. *Id.* at 354. While the majority in *Good News Club* characterized the Good News Club's activities as "the

teaching of morals and character development from a particular viewpoint," 533 U.S. at 111, 121 S.Ct. 2093, the *Bronx Household* court determined that this characterization "cannot be divorced from Justice Souter's detailed description [in his dissent] of the Club's activities [as worship] that the majority adopted as accurate." *Bronx Household,* 331 F.3d at 354 (citing *Good News Club,* 533 U.S. at 112, 121 S.Ct. 2093 n. 4). The Second Circuit could not find any meaningful distinction between the activities Bronx Household was engaging in, and the activities at issue in *Good News Club,* where the Supreme Court held that excluding a club's religious activities from school classrooms otherwise open to community groups was discrimination based on viewpoint. *Id.*

Faith Center's religious activities and those in *Bronx Household* and *Good News Club,* are likewise too similar to make any meaningful distinction that would immunize the County from First Amendment violations. Whether "mere religious worship" can be defined or not, the County's assertion that the prohibition of "religious services" is nothing more than content-based discrimination runs counter to the precedent set in *Good News Club.*

The majority opinion attempts to distinguish *Bronx Household* in two ways: (1) Faith Center's activities do not contain "elements of worship" that further secular activities as in *Bronx Household,* but consist entirely of praise and religious worship; and (2) the forum in *Bronx Household* was different because the meeting was held in a school classroom after hours rather than a library meeting room during the day. Maj. Op. at 915-16. But this reasoning is based on a faulty premise and an irrelevant issue.

1

Faith Center has never claimed that its services are *mere* religious worship, devoid of speech on permissible secular topics.[6] Faith Center specifically argues that its activities are similar to those in *Bronx Household,* in which the Sunday morning meeting services contained the "singing of Christian hymns and songs, prayer ... Biblical preaching and teaching, communion, sharing of testimonies and social fellowship among the church members." 351 F.3d at 347. The only differences between the church's activities in *Bronx Household* and those of Faith Center is that the *Bronx Household* church did not call its activities "worship" and failed to conveniently separate on a flyer the "worship" portion of its activities with a fellowship meal discussing secular topics. *Id.* at 347, 354.

Apparently, this is enough for my colleagues to declare that these cases are so dissimilar that to reverse the district court here would not be creating a circuit split. They are wrong. Framing the argument in this manner repeats the same analytical mistake committed by the University of Missouri in *Widmar:*

The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech.

454 U.S. at 273, 102 S.Ct. 269.

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[6] *See supra* § I n. 2.

The common issue in all of these cases is what types of activities encompass a religious worship service. Faith Center explains that during its service Pastor Hattie ***930** Mae Hopkins may deliver a sermon, and the group may pray and sing religious songs. Not only are these activities the same as those at issue in *Bronx Household,* thus lending credence to the notion that the two cases are in fact indistinguishable, but parsing out the actual nature of the worship clarifies the answer to a question my colleagues never bother to ask: *why* is religious worship not speech containing viewpoints on otherwise permissible secular topics?

Singing a religious song may very well be akin to singing about morality according to religious tenets. Praying is usually speech containing praise to a higher being, but may also contain personal characterizations of one's own life, wishes, hopes, or concerns. Pastor Hopkins's sermon is the clearest example of religious speech which expresses a viewpoint on otherwise permissible secular topics. One can imagine the variety of subject matter that could be included in a sermon-money, family, love, or avoiding drugs and alcohol, to name a few. The list is endless.

Instead, the opinion categorizes all of Faith Center's worship activities into one neat box and then calls it impermissible speech. Yet it never examines the nature of that speech.

2

The opinion also distinguishes *Bronx Household* by where the meeting rooms are located. Comparing this case to *Bronx Household* brings forth the inevitable question as to whether there is a difference between non-disruptive meetings held in

a public meeting room during library hours and meetings held in an empty classroom or auditorium on public school grounds after school or on weekends. Despite any facial distinctions, Faith Center's religious services do not lose their character as communication on permitted subject matter from a religious viewpoint simply because they are held in a library meeting room open to public use rather than at a school after hours. It is important to emphasize that the County has never argued that noise from Faith Center's religious activities disturbed the peace of other library patrons elsewhere in the building. Unlike the cases in which groups were allowed on a public school campus to hold meetings, the policy did not restrict the use of the library meeting room to after hours when the stacks and reading area were closed.

The County argues that because the library is open to the public during the hours in which Faith Center wishes to hold its meetings, library patrons would come to believe that the County is endorsing Faith Center's religious service. Looking at the context of Faith Center's meetings, a reasonable observer, "aware of the history and context of the community and forum," would no more believe that the County was endorsing Faith Center's meeting than it would believe the County was endorsing the Boy Scouts, the Sierra Club, or Narcotics Anonymous. *See Good News Club,* 533 U.S. at 119, 121 S.Ct. 2093 (quoting *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 779-90, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'Conner, J., concurring)). Our court says that "[t]he County reasonably could conclude that the controversy and distraction of religious worship within the Antioch Library meeting room may alienate patrons and undermine the library's purpose of making itself available to the whole community." Maj. Op. at 911. Yet the library opened itself up to another group which could easily be as controversial and distracting to

some patrons-the East Contra Costa Democratic Club. Clearly, the opinion sees no problem with other types of controversial speech.

All meetings held at the Antioch Library are closed-door meetings. There is no evidence***931** that Faith Center's religious service was generally disruptive or that library patrons were bothered. The reasonable observer would be the library patron who knows the purpose for the meeting room, its policy, and its scope. This patron would be aware of the number of different community groups that have used the meeting room. Arguing that this informed observer would perceive a government endorsement of Faith Center's activities just because of the possibility that he or she may hear some of what is going on in the room is akin to saying that this individual would perceive the County to be endorsing specific political speech when the East Contra Costa Democratic Club used the same room. There is simply "no realistic danger that the community would think that the [Library] was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." *Lamb's Chapel,* 508 U.S. at 395, 113 S.Ct. 2141; *see Widmar,* 454 U.S. at 271, 102 S.Ct. 269 (holding that allowing equal access to religious groups would not be incompatible with a government's compelling interest in avoiding an Establishment Clause problem).

The County further argues that cases like *Bronx Household* found no Establishment Clause violation *because* the meetings were held after school hours.[7] This interpretation of the case is

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[7] I note that the court's opinion does not address the County's Establishment Clause argument, but distinguishing

not supported by a reading of *Bronx Household,* as the hours were but one factor in the Second Circuit's ultimate ruling on whether the school's policy presented Establishment Clause problems. 331 F.3d at 356. In addition to the hours, the proposed meetings: (1) were "not endorsed by the School District"; (2) were "not attended by any school employee"; and (3) were "open to all members of the public." *Id.* While community meetings are held during library hours, Faith Center's meeting would also be open to the public. In addition, (1) the County would not be endorsing the meeting (in fact, the flyer for Faith Center's meeting specified that it would be the meeting's sponsor); (2) all library patrons would be on the premises voluntarily (unlike children attending public school during school hours); (3) the meeting would be held in a closed room; and (4) patrons would be aware of the policy and the types of groups that have used the meeting room. Additionally, the County would be able to enforce reasonable time, place, and manner restrictions, applicable to all groups using the meeting room, in order to maintain the academic atmosphere of the remaining library space. *See Widmar,* 454 U.S. at 276, 102 S.Ct. 269. Faith Center only intended to use the Antioch Library meeting room one Saturday every other month for four hours. Certainly the County could place a reasonable restriction on the number of times any group may use the meeting room within a one or two month span, thus alleviating the County's fear that the library meeting room will become a permanent house of worship.

The Supreme Court's decisions in *Good News Club, Widmar,* and *Lamb's Chapel,* and the Second Circuit's opinion in *Bronx*

Bronx Household from this case on the basis of the forum in each inevitably forces us to confront this issue.

Household cannot meaningfully be distinguished from the facts presented in this case. Faith Center has demonstrated that the County's enforcement of the policy is substantially likely to result in restricting speech based on viewpoint.

III

I do not question Contra Costa County's sincere appreciation of one of our nation's fundamental constitutional tenets-the separation of Church and State-or my ***932** colleagues' adherence to this important principle. But the County has gone too far, and the court ignores the inherent constitutional flaws in the County's argument. In the County's attempt to walk the line between opening its doors to encourage its patrons to speak freely and closing its ears to religious doctrine, it has prevented its citizens from voluntarily hearing the "educational, cultural and community" views of an entire segment of the population in an accessible public space it opened for that very purpose.

Rather than adopting a policy of neutrality and placing reasonable time, place, and manner restrictions on every group that uses the library meeting rooms, the County has gone to great lengths to exclude a non-disruptive community group based on the views it wishes to express. The court fails in its analysis to adequately acknowledge the Establishment Clause entanglement problems this exclusion creates. Just as the government's endorsement of one particular religion would run counter to the principles upon which this nation was founded, a County librarian's attempt to define what constitutes religious worship and what does not also violates these principles. Squelching a viewpoint based solely on the non-obtrusive manner in which it is spoken impermissibly silences speech and exhibits a prejudice against religion that the First Amendment

does not tolerate.

I see no abuse of discretion in the district court's grant of a preliminary injunction requiring the County to allow Faith Center the same access to the Antioch Library's meeting room that most other groups are allowed under the County's broad, inclusive policy. I respectfully dissent.

2005 WL 1220947

UNITED STATES DISTRICT COURT, N.D. CALIFORNIA

FAITH CENTER CHURCH EVANGELISTIC MINISTRIES, ET AL., PLAINTIFFS,

v.

FEDERAL D. GLOVER, ET AL., DEFENDANTS.

No. C 04-03111 JSW.

MAY 23, 2005.

JOSHUA WILLIAM CARDEN, BENJAMIN WYMAN BULL, ELIZABETH A. MURRAY, SCOTTSDALE, AZ, ROBERT HENRY TYLER, MURRIETA, CA, TERRY LEE THOMPSON, LAW OFFICES OF TERRY L. THOMPSON, ALAMO, CA, FOR PLAINTIFFS.

KELLY M. FLANAGAN, CONTRA COSTA COUNTY OFFICE OF THE COUNTY COUNSEL, MARTINEZ, CA, FOR DEFENDANTS.

ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

WHITE, J.

*1 This matter comes before the Court upon consideration of Plaintiffs' motion for a preliminary injunction. Plaintiffs move to enjoin Defendants from enforcing a policy that prohibits using public meeting rooms within the Contra Costa County Library system, and in particular the Antioch Branch, for

"religious services."[1]

Having considered the parties' pleadings, including supplemental briefing ordered by the Court, the record in this case, relevant legal authority, and having had the benefit of oral argument, the Court GRANTS Plaintiffs' motion for a preliminary injunction.

II. FACTUAL SUMMARY

When faced with a motion for a preliminary injunction, the Court "is not required to make any binding findings of fact; it need only find probabilities that the necessary facts can be proved." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir.1984). Accordingly, the facts recited herein are not to be considered final and binding on the rest of the proceedings. Rather, based on the current evidentiary record, the Court concludes they are substantially likely to be proved at trial.

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[1] Plaintiffs allege that Defendants: (1) violated their rights to freedom of speech under the First Amendment to the United States Constitution; (2) violated their rights to free exercise of religion under the First Amendment of the United States Constitution; (3) violated the Establishment Clause of the First Amendment to the United States Constitution; and (4) violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Amended Verified Complaint, ¶¶ 86-114.)

A. The Parties.

Plaintiff Faith Center Church Evangelistic Ministries ("Faith Center"), is a non-profit religious corporation. Plaintiff Hattie Mae Hopkins ("Dr.Hopkins") is the leader of Faith Center. (Amended Verified Complaint ("Complaint"), ¶¶ 10-11.) Defendants are members of the Contra Costa County Board of Supervisors, the Contra Costa County Administrator, the Contra Costa County Librarian, the Senior Branch Librarian of the Antioch Branch of the Contra Costa County Public Library System, and the Administrative Deputy Director of the Antioch Branch.[2] (*Id.*, ¶¶ 12-20.)

Dr. Hopkins is the leader of Faith Center and believes that she is called to share her faith with others. Dr. Hopkins also believes that there are many individuals who need to hear about the gospel of Jesus Christ but who may never enter a traditional church building. (*Id.*, ¶¶ 21-23.) Under the auspices of Faith Center, Dr. Hopkins holds meetings at which participants discuss educational, cultural, and community issues from a religious perspective, engage in religious speech and religious worship, discuss the Bible and other religious books, teach, pray, sing, share testimonies, share meals, and discuss social and political issues. (*Id.*, ¶¶ 25-26; Declaration of Danielle Merida ("Merida Decl."), Ex. A.)[3] These meetings are not held inside a traditional church building. (Complaint, ¶ 26.)

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[2] The Court hereafter refers to the Antioch Branch of the Contra Costa County Library system as "the Library."

[3] As noted, Plaintiffs submitted a verified complaint and, as such, have attested to the truth of the facts set forth therein.

B. The Policies At Issue.

Contra Costa County, by resolution, has adopted a policy relating to the use of meeting rooms in its libraries. (Complaint, Exs. C, E; Declaration of Anne Cain ("Cain Decl."), Ex. A.) Pursuant to that policy, Defendants "encourage the use of library meeting rooms for educational, cultural and community related meetings, programs, and activities." (Cain Decl., Ex. A.) According to the policy, "non-profit and civic organizations, for-profit organizations, schools, and governmental organizations" may use library meeting rooms. There are some restrictions in place. Pertinent to this motion is the restriction on "Religious Use," which has twice been amended since this action was filed. The policy initially provided that "[l]ibrary meeting rooms shall not be used for religious purposes" (hereinafter "the Policy"). (Complaint, Ex. C.) In or about August 2004, the policy was amended to prohibit use of library meeting rooms for "religious services or activities." (*Id.*, Ex. E.) In or about December 2004, the policy again was amended and currently prohibits the use of library meeting rooms for "religious services" (hereinafter "the Amended Policy"). (Cain Decl., Ex. A.)

***2** The record currently before the Court demonstrates the following additional restrictions on use of library meeting rooms: (1) a person or entity wishing to use a meeting room must complete an application and reservations are contingent upon approval by the County; (2) if the purpose for which the meeting room is used involves solicitation or selling, is closed to the general public, or if an admission fee is charged by the applicant, the applicant must pay a fee; and (3) schools may not use a meeting room for "instructional purposes as a regular part of the curriculum." (Cain Decl., ¶ 6, Ex. A.) The policy also

refers to implementing rules and regulations, but those rules and regulations currently are not in the record. (*Id.*)

Defendants have approved applications to use the meeting room at the Antioch Branch (the "Library meeting room") submitted by the Sierra Club for purposes of letter writing, Narcotics Anonymous for a recovery meeting, and the East Contra Costa Democratic Club to "let people learn about Democratic candidates and issues." (Affidavit of Robert H. Leach ("Leach Aff."), Exs. D, E, H.)[4]

C. Events Preceding the Filing of this Action.

In May 2004, Dr. Hopkins obtained and completed applications to use the Library meeting room on May 29 and July 31, 2004. (Complaint, ¶¶ 28-29, 36, 39-41 & Exs. A, B.) Prior to the May 29 meeting, Dr. Hopkins phoned the Library twice to confirm that Faith Center's dates were on the Library calendar and was advised that they were. (*Id.*, ¶¶ 42-43.) Dr. Hopkins and Library staff also discussed the fact that the room was not soundproofed. (*Id.*, ¶¶ 44-48.) Dr. Hopkins advised the Library staff that noise from Library patrons would not bother

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[4] The Leach Affidavit also includes applications to other branches of the Contra Costa County Library system. The relevant forum for purposes of this case, however, is the Antioch Branch Library meeting room, and it is those applications which the Court has considered in resolving this motion. *See, e.g., DiLoreto v. Downey Unified School Dist. Bd. of Ed.*, 196 F.3d 958, 967 (9th Cir.1999) (finding that although another high school within the district permitted certain types of advertisements, that fact was of no moment because "forum is defined by access sought by the speaker").

Plaintiffs' meetings, and Dr. Hopkins was advised that noise from the meeting would not bother Library patrons. (*Id.*, ¶¶ 44-48.)[5]

In Faith Center's applications, Dr. Hopkins is identified as a "Pastor," and the applications state that Plaintiffs' purpose for using the room was for "prayer, praise and worship open to public, purpose to teach and encourage salvation through Jesus Christ and build up community [*sic*]." (*Id.*, Exs. A, B.)[6] Faith Center held the meeting scheduled for May 29, 2004, which included the activities that Faith Center meetings generally include. (*Id.*, ¶¶ 26, 49-50.) Plaintiffs did not use musical instruments or amplified sound during the meeting. (*Id.*, ¶ 51.) Toward the end of the meeting, Plaintiffs were advised by Library personnel that groups were not permitted to use the meeting room for religious activities. (*Id.*, ¶ 52.) Plaintiffs were advised that the problem regarding their use of the room was not due to excessive noise. (*Id.*, ¶¶ 53-54.) Dr. Hopkins was also shown the policy then in effect precluding use of the room for "religious purposes," and Library personnel told her Faith

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[5] Defendants submit evidence that Plaintiffs' May 29 meeting could be heard "outside the meeting room." (Cain Decl., ¶ 12.) Defendants, however, have not put forth evidence that the noise disturbed or otherwise bothered Library patrons.

[6] Defendants claim that Plaintiffs did not return a completed application for the May 29, 2004 date until after the meeting. (Cain Decl., ¶ 10.) However, in a letter dated July 5, 2004, Dr. Hopkins stated the applications were submitted several weeks before that meeting. (Complaint, Ex. D.)

Center would not be able to use the room on July 31. (*Id.*, ¶¶ 55-62, Ex. C.)

*3 Thereafter, the parties continued to discuss, orally and in writing, Plaintiffs' desire to use the room and the legality of the Policy. These discussions did not prove successful, and Plaintiffs were advised that they would not be permitted to use the room for the July 31, 2004 meeting. (*Id.*, ¶¶ 62-78.) Plaintiffs wish to use the Library meeting room to hold Saturday morning meetings, every other month, for a period of four hours. (*Id.*, ¶¶ 79-80.) Accordingly, on July 30, 2004, Plaintiffs filed this action.

III. ANALYSIS

A. Standards Applicable to Motions for Preliminary Injunction.

The standards for obtaining a preliminary injunction are well established. It is appropriate to issue a preliminary injunction if the moving party establishes either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in favor of the moving party. *Stuhlbarg Intern. Sales Co. v. John D. Brush and Co.*, 240 F.3d 832, 839-840 (9th Cir.2001). " 'These formulations are not different tests, but represent two points on a sliding scale in which the degree of irreparable harm increases as likelihood of success on the merits decreases." ' *Associated Gen. Contractors of Calif. v. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th Cir.1991) (quoting *Big Country Foods, Inc. v. Board of Education*, 868 F.2d 1085, 1088 (9th Cir.1989)). Where, as here, a plaintiff seeks a "mandatory"

injunction that would alter the status quo, he or she must show that the facts and the law are "clearly" in his or her favor. *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir.1993). In addition, within the Ninth Circuit, the Court must also consider the public interest when it assesses the propriety of issuing an injunction. *Sammartano v. First Judicial District Court,* 303 F.3d 959, 973 (9th Cir.2002).

B. Plaintiffs Have Established a Likelihood of Success on the Merits.

The legal issues presented by this case are not novel. "Courts often struggle to reconcile the principle of equal access to government buildings, with a competing principle of American public life, that is, the separation of church and state." *Bronx Household of Faith v. Board of Education of the City of New York,* 331 F.3d 342, 344 (2d Cir.2003). Factually, however, this case appears to present a matter of first impression. The Court has not found any direct authority either permitting or prohibiting a party to use a meeting room in a public library to engage in activities that include conduct that could be categorized as religious services .[7]

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[7] In deciding this case, the Court has been mindful of and has struggled with Justice Souter's views expressed in his dissent in *Good News Club v. Milford Central School,* 533 U.S. 98, 139, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001), notably his view that the majority's interpretation of the plaintiffs' activities in that case "would stand for the remarkable proposition that any public [building] opened for civic meetings must be opened for use as a church, synagogue or mosque." *Id.* at 139 (Souter, J., dissenting.)

For the reasons set forth herein, the Court concludes that Plaintiffs have established a that the facts and the law are clearly in their favor and thus have established a likelihood of success on the merits on their First Amendment challenge to the Defendants' policies and have shown the possibility of irreparable harm.

1. The facts and the law clearly favor Plaintiffs and show that, as applied, the Defendants' policies violate their First Amendment right to freedom of speech.

***4** The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech...." U.S. Const. amend. I. Plaintiffs claim that each iteration of the Library's policy on religious use of the Library meeting room violates their right to free speech, facially and as applied, because Plaintiffs are not permitted to use the Library meeting room to hold Faith Center meetings, meetings which the record demonstrates include a component that can be characterized as "services."[8] (Complaint, Ex. D.) Defendants contend that Plaintiffs can use the Library meeting room to discuss permissible topics from a religious perspective, so long as they do not hold a "religious service." (Def. Opp. at

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[8] Plaintiffs raise both facial and as applied challenges to the Defendants' regulation of speech in the Library meeting room. With respect to the as applied challenge, the Court considered the policy in effect at the time Plaintiffs submitted their application to use the meeting room, which precluded use of the room for "religious purposes." With respect to Plaintiffs' facial challenge, the Court has considered the Amended Policy, which precludes only religious services.

19; Def. Supp. Br. at 9-10.)

When faced with a challenge to a government regulation based on a claim that the regulation violates a litigant's First Amendment right to freedom of speech, a court makes three inquiries. It must first determine if the speech in question is in fact protected by the First Amendment. *Cornelius v. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788, 797, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). If the speech is not protected, the inquiry ends. If, however, the speech is protected, the second step in the analysis is to identify the nature of forum in which the speech is regulated. *Id.* The third step is to assess whether a defendant's justification for excluding a plaintiff from the relevant form satisfies the requisite standard. *Id.* Viewpoint discrimination, however, is never permissible, even in a non-public forum. *Lamb's Chapel v. Center Moriches Sch. Dist.,* 508 U.S. 384, 394, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (*citing Cornelius,* 473 U.S. at 806).

a. Plaintiffs' expressive activity is protected by the First Amendment.

Defendants do not dispute that Plaintiffs wish to engage in speech within the Library meeting room that is protected, *i.e.* Plaintiffs' meetings would encompass discussions of otherwise permissible topics from a religious perspective. *See Good News Club,* 533 U.S. at 111-112; *Lamb's Chapel,* 508 U.S. at 394-395. Defendants also conceded at oral argument that "religious worship" is a protected form of activity under the First Amendment. *See, e.g., Widmar v. Vincent,* 454 U.S. 263, 269, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (noting that "religious worship and discussion are forms of speech and association protected by the First Amendment"). Accordingly, the Court will take it as established for purposes of this motion

that, whether Plaintiffs' expressive activities constitute "mere worship" or something more, they are protected by the First Amendment.

b. Plaintiffs have shown that Defendants' enforcement of the policies is substantially likely to result in restricting speech based on viewpoint.

Although the next step in the Court's inquiry normally would be to examine the nature of the forum, the Court concludes that Defendants' policies have and can result in discrimination against Plaintiffs' speech based on its viewpoint.[9] Defendants contend that precluding religious services does not constitute viewpoint discrimination, but they acknowledge that at least some of the activities in which Plaintiffs engaged in during the May 29, 2004 meeting were permissible, *i.e.* Plaintiffs discussed otherwise permissible topics from a religious

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[9] Plaintiffs contend that the Library meeting room is a designated public forum, and thus any regulations on speech must be judged "subject to the same [strict] limitations that govern a traditional public forum." *DiLoreto,* 196 F.3d at 964-965. Defendants contend the Library meeting room is only a limited public forum, and thus regulations that are "viewpoint neutral and reasonable in light of the purpose served by the forum" are constitutionally permissible. *Id.* For purposes of this motion and on the record before the Court, Plaintiffs have shown that enforcement of the Policy did result in viewpoint discrimination and that it is substantially likely that enforcement of the Amended Policy will also result in restricting speech based on its viewpoint. Accordingly, at this stage of the litigation, the Court need not and does not reach the question of the nature of the forum.

viewpoint. *See Good News Club,* 533 U.S. at 111-112. Defendants also argue that a flyer describing Plaintiffs' meetings suggests that this case presents a case not yet decided by any court, *i.e.* one in which the "worship" activities can be "divorced from ... other activities permitted in the forum." *See Bronx Household of Faith,* 331 F.3d at 354. The Court disagrees.

***5** In *Widmar,* the Supreme Court noted that the difficulty in determining when activities such as "singing hymns, reading scripture, and teaching biblical principles" transform from a discussion of issues from a religious perspective into worship. *Widmar,* 454 U.S. at 270 n. 6; *see also id.* at 272 n. 11. Thereafter, in *Good News Club,* the Supreme Court placed its focus on the substance of the challenged activities, rather than the label attached to them. *Good News Club,* 533 at 112 n. 4. Here, looking at the substance of the activities in which Plaintiffs wish to engage, the Court finds that it cannot parse those activities in such a fashion to separate "mere religious worship" from other permissible activities. In reaching this decision, the Court finds guidance in *Bronx Household of Faith,* 331 F.3d 342 and *Campbell v. St. Tammany Parish School Board,* 2003 WL 21783317 (E.D.La. July 30, 2003).

In *Bronx Household of Faith,* decided after *Good News Club,* the Second Circuit affirmed the district court's decision to grant a preliminary injunction enjoining the defendants' policy that prohibited "religious services or religious instruction" in public schools opened for use after hours for "social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community." *Bronx Household of Faith,* 331 F.3d at 348. The plaintiffs, an evangelical Christian church and its pastors, sought to use school facilities

for activities that included "the singing of Christian hymns and songs, prayer, fellowship with other church members and Biblical preaching and teaching, communion, sharing of testimonies, and social fellowship among the church members." *Id.* at 347. Like the meetings proposed by Plaintiffs in this case, the plaintiffs' meetings were open to the public. *Id.* As in this case, the plaintiffs were denied access because of the defendants' prohibition on "religious services or instruction" in the forum. *Id.* at 348.

The Second Circuit concluded that the plaintiffs were substantially likely to prevail on their First Amendment claims because the court found "no principled basis on which to distinguish the activities set out by the Supreme Court in *Good News Club* from the activities that [plaintiffs] have proposed for [their] Sunday meetings." *Id.* at 354. Recognizing that some of plaintiffs' proposed activities, such as prayer, singing of Christian songs, and communion, were "quintessentially religious," the court also noted that the plaintiffs' meetings encompassed secular elements, like a fellowship meal. The court concluded that "[o]n these facts, it cannot be said that the meetings of the Bronx Household of Faith constitute only religious worship, separate and apart from any teaching of moral values." *Id.*

Similarly, in the *Campbell* case, defendants enacted a regulation precluding religious services or religious instruction in public schools, which the district court classified as limited public fora. On remand for reconsideration in light of *Good News Club,* the district court concluded that the regulation resulted in viewpoint discrimination *even though* plaintiffs' proposed meeting encompassed "what *primarily* was a religious service." *Campbell,* 2003 WL 81783317 at *9 (emphasis in original). The court cited the Supreme Court's

statement in *Good News Club* that

> *6 ... just because a meeting is "quintessentially religious" does not mean it "cannot be characterized properly as the teaching of morals and character development." ... Likewise, simply because Campbell's proposed service was "quintessentially religious" does not preclude it from being characterized as a discussion of family and political issues. *Here the proposed meeting was not "mere religious worship," but included a component within the permissible scope of the limited forum.*

Id. (emphasis added) (citations omitted). Accordingly, acknowledging the difficulties presented in attempting to parse the plaintiffs' proposed activities, the district court concluded that because the plaintiffs' meeting included discussions of permissible topics from a religious perspective as well as "worship", the defendants could not preclude the plaintiffs from meeting in the forum. *Id.* at *10.

Here, Plaintiffs' meetings combine activities that, like those at issue in *Bronx Household of Faith* and *Campbell,* may be classified as "quintessentially religious." However, the meetings also encompass secular components that fit within the overall purposes for which Defendants have opened the forum. Like the courts in *Bronx Household of Faith* and *Campbell,* this Court cannot classify Plaintiffs' proposed use of the Library meeting room as "mere religious worship." To follow the reasoning of the Second Circuit, because Defendants have authorized other groups to use the Library meeting room for educational, cultural and community related meetings, under Supreme Court authority, there is a substantial likelihood that Plaintiffs can establish that Defendants cannot exclude their proposed activities without engaging in unconstitutional

viewpoint discrimination. *See Bronx Household,* 331 F.3d at 354.

Unlike the plaintiffs in *Bronx Household of Faith* and *Campbell,* Plaintiffs in this case want access to a meeting room in a public library rather than a public school and want access to that room during normal Library hours. The record demonstrates that the meeting room is enclosed and, thus, other Library patrons are not compelled to observe Plaintiffs' activities.[10] (*See* Cain Decl., ¶ 5.) For this reason, and based on the current record, the Court does not find a sufficient distinction between the public school facilities at issue in *Bronx Household of Faith* and *Campbell* and the forum here to warrant a different outcome. Accordingly, the Court concludes that Plaintiffs have established a likelihood of success on the merits of their claim that Defendants have violated their First Amendment right to free speech.

c. Defendants have not shown a compelling state interest justifying imposing the restriction on religious services.

Defendants contend that they must enforce the policy to avoid violating the Establishment Clause. The Supreme Court has foreclosed this argument by consistently holding that a policy of equal access does not violate the Establishment Clause. *See Good News Club,* 533 U.S. at 112-119; *Lamb's Chapel,* 508 U.S. at 394-396; *Widmar,* 454 U.S. 271-275. *Accord Prince v.*

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[10] As noted, the record suggests that Library patrons could hear Plaintiffs' meeting. (Cain Decl., ¶ 12.) That is not the basis on which Plaintiffs were excluded from the forum. Nor has it been suggested that Library patrons were bothered by the noise.

Jacoby, 303 F.3d 1074, 1092 (9th Cir.2002) (finding no establishment clause violation by allowing religious group access to forum even if groups activities included some "devotional exercises").

***7** In general, "a policy will not offend the Establishment Clause if it can pass a three-pronged test": (1) the policy must have a secular legislative purpose; (2) its principal or primary effect must not be one that advances or inhibits religion; and (3) the policy must not "foster an excessive government entanglement with religion." *Widmar,* 454 U.S. at 271 (*quoting Lemon v. Kurtzman,* 403 U.S. 602, 612-613, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)). Concluding that the policy at issue in *Widmar* passed the first and third prongs of the *Lemon* test, the Supreme Court found that it would also not violate the second prong because "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices," and because the provision of benefits to a wide range of groups was "an important index of secular effect." *Id.* at 275. Finally, the Supreme Court also found persuasive the fact that there was no empirical evidence suggesting that religious groups would dominate the forum. *Id.; see also Lamb's Chapel,* 508 U.S. at 395 (holding that policy would not violate Establishment Clause where film would be shown after school hours, would not have been sponsored by the school, and would have been open to the public).

The parties agree that the Defendants' general policy in opening the forum has a secular purpose. With respect to concerns about the "primary effect" prong, as noted, the forum in question is located within a public library rather than a public school but, as is discussed above, the Library meeting room is enclosed and Library patrons are not necessarily exposed to Plaintiffs'

activities. In addition, Faith Center meetings are open to the general public and there is no evidence that Defendants or their employees would attend the meetings. Finally, Defendants have permitted a wide variety of groups to use the room for a wide variety of purposes, and there is no evidence that religious groups will dominate or have dominated the use of the Library meeting room. (*See* Cain Decl., Ex. A; Leach Aff., Exs. D, E, H.) On the record currently before the Court, which presents a factual situation similar to the factual situations presented in the *Good News Club, Lamb's Chapel, Bronx Household of Faith* and *Campbell* cases, the Court finds that opening the forum to Plaintiffs would not have the primary effect of advancing or inhibiting religion. Finally, for purposes of this motion, the Court concludes that requiring equal access to the forum would not result in an excessive entanglement in religion. Accordingly, at this stage of the proceedings, Defendants' reliance on the Establishment Clause does not warrant denial of Plaintiffs' motion.

At oral argument, Defendants also forcefully argued that if the Court enjoins them from enforcing the Amended Policy, they will be faced with the *possibility* of challenges by other religious groups relating to the Free Exercise Clause of the First Amendment. That argument depends, however, on a challenge to a regulation or rule other than the one at issue, matters which are not before this Court.[11] Thus, at this stage of the proceedings, the Court concludes this hypothetical concern also

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[11] Defendants did not enter the rules and regulations governing use of the Library meeting room into the record, so the Court cannot evaluate whether enforcement of those rules and regulations might possibly lead to a potential Free Exercise violation.

cannot justify denying Plaintiffs' motion.

***8** Therefore, the Court concludes Plaintiffs have established a substantial likelihood of success on the merits of their claim that the Defendants have violated their First Amendment right to freedom of speech.

B. Plaintiffs Have Established a Showing of Irreparable Harm if the Injunction Is Not Granted.

In addition to establishing a substantial likelihood of success on the merits, Plaintiffs must establish a showing of irreparable harm. The Court concludes they have met their burden. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). In addition, " 'a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." ' *Sammartano,* 303 F.3d at 973 (quoting *Viacom Int'l, Inc. v. F.C.C.,* 828 F.Supp. 741, 744 (N.D.Cal.1993)).

Because the Court has concluded that Plaintiffs have established that they are substantially likely to prevail on their claim that enforcement of the various iterations of Defendants' policies results in the violation of their First Amendment right to freedom of speech, the Court concludes that they have demonstrated the requisite showing of irreparable harm. *See Sammartano,* 303 F.3d at 973-974 (noting that under Ninth Circuit precedent "when the harm claim is a serious infringement on core expressive freedoms, a plaintiff is entitled to an injunction even on a lesser showing of meritoriousness");

cf. Bronx Household, 331 F.3d at 349-350 (affirming finding of irreparable harm where "alleged deprivation of plaintiffs' First Amendment rights" arose directly from challenged policy).

C. Public Interest.

Finally, the Court considers the public interest in determining whether Plaintiffs have met their burden to show issuance of the injunction is warranted. *See Sammartano,* 303 F.3d at 974. "The public interest inquiry primarily addresses impact on non-parties rather than parties." *Id.* "Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Id.* (citing cases). The Court's ruling in this case has the potential to impact non-parties. The Court concludes that continued enforcement of the potentially unconstitutional Amended Policy has not only impacted and infringed upon Plaintiffs' First Amendment rights, but also would infringe upon interests of other groups or individuals who may wish to use the Library meeting room to engage in activities that may combine "quintessentially religious" activities with activities that are otherwise permitted in the forum. Accordingly, the Court concludes that the public interest weighs in favor of granting the injunction.

D. Bond.

"No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Fed.R.Civ.P. 65(c). The Court, however, retains the discretion to set the amount of security required, and in some cases courts

have dispensed with the security requirement altogether. *See, e.g., Jorgensen v. Cassiday,* 320 F.3d 906, 919 (9th Cir.2003).

***9** At the hearing on this matter, Plaintiffs urged the Court to waive the security requirement. The Court has considered the need for a bond in this case and determines that this is a case where waiver of a bond is appropriate because there is no significant risk that Defendants will incur damages as a result of the injunction.

V. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Plaintiffs' motion for a preliminary injunction. Accordingly, Defendants are hereby enjoined from enforcing the "Religious Use" provision of the Amended Policy so as to deny Plaintiffs' application to reserve the Library meeting room for meetings that include religious services, or the application of any similarly situated individual or entity. The Court denies Plaintiffs' request that the injunction preclude Defendants from closing the forum pending the outcome of this litigation.

Furthermore, in order to give the Defendants sufficient time to evaluate and to implement this injunction, the Court FURTHER ORDERS that this preliminary injunction shall not take effect until Tuesday, June 7, 2005 at 9:00 a.m.

IT IS SO ORDERED.

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480 F.3d 891

United States Court of Appeals,

Ninth Circuit.

FAITH CENTER CHURCH EVANGELISTIC MINISTRIES, a California non-profit religious corporation; Hattie Hopkins, an individual, Plaintiffs-Appellees,

v.

Federal D. GLOVER, member and Chair of the Contra Costa County Board of Supervisors; Mark Desaulnier; John M. Gioia; Millie Greenberg, members of the Contra Costa County Board of Supervisors; John W. Sweeten; Anne Cain, Contra Costa County Librarian; Patty Chan, Senior Branch Librarian for the Antioch Branch of the Contra Costa County Public Library; Laura O'Donahue, Administrative Deputy Director for the Antioch Branch of the Contra Costa County Public Library; Gayle B. Uilkema, Defendants-Appellants.

No. 05-16132.

Argued and Submitted Feb. 17, 2006.
Filed Sept. 20, 2006.
Amended March 9, 2007.

Reversed in part, vacated in part, and remanded.

Karlton, Senior District Judge, sitting by designation, filed concurring opinion.

Tallman, Circuit Judge, filed dissenting opinion.

Bybee, Circuit Judge, dissented from denial of rehearing en

banc, and filed opinion in which Circuit Judges O'Scannlain, Kleinfeld, Tallman, Callahan, Bea and Smith, Jr, joined.

Opinion, 462 F.3d 1194, vacated.

ORDER

The final sentence of the seventh paragraph of Section V.A. of the Opinion filed September 20, 2006 and published at 462 F.3d 1194, 1209 (9th Cir.2006), is amended by inserting the following after "*See id.* at 138 n. 3, 121 S.Ct. 2093, 150 L.Ed.2d 151": "(Souter, J., dissenting)."

The full court was advised of the petition for rehearing en banc. A judge of the court called for a vote on whether to rehear the matter en banc. On such vote, a majority of the nonrecused active judges failed to vote in favor of en banc rehearing.

The petition for rehearing en banc is DENIED. Judge Bybee's dissent from denial of en banc rehearing is filed concurrently herewith.

BYBEE, Circuit Judge, with whom O'SCANNLAIN, KLEINFELD, TALLMAN, CALLAHAN, BEA and SMITH, JR., Circuit Judges, join, dissenting from the denial of rehearing en banc:

The panel majority's decision permits the government to single out what it calls "mere religious worship" for exclusion from a forum that it has opened broadly for use by community and cultural groups. In so doing, the majority has disregarded equal-access cases stretching back nearly three decades, turned

a blind eye to blatant viewpoint discrimination, and endorsed disparate treatment of different religious groups. I respectfully dissent from the court's decision not to rehear this case en banc.

I

The Contra Costa County Library makes its rooms generally available to the public for "educational, cultural and community related meetings, programs and activities." *Faith Ctr. Church Evangelistic Ministries v. Glover,* 462 F.3d 1194, 1198 (9th Cir.2006). The County's policy contains several time, place, and manner restrictions, along with one purportedly content-based restriction: The rooms "shall not be used for religious services." *Id.* at 1198-99. All other meetings-including those involving religious speech short of "services"-are welcome to the library.[1]

Faith Center Evangelistic Ministries Outreach reserved a meeting room at the County's Antioch Library for a four-hour period. In its promotional flyers, Faith Center described the scheduled meeting as having two components: two hours in the morning for a "Wordshop" entitled " 'The Making of an

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[1] The library's policy has undergone some refinement. Prior to 2004, the policy said no "religious purposes." In mid-2004, the policy was amended to prohibit "religious services or activities." In late 2004, the Board of Supervisors adopted the current no "religious services" policy. The panel majority's opinion appears to revise it yet again, narrowing the prohibition to encompass only religious services that consist of "mere religious worship."

Intercessor,' an End-Time call to Prayer for every Believer, and how to pray fervent, effectual Prayers that God hears and answers," and two hours in the afternoon for a "Praise and Worship" ***896** meeting, including a sermon. The library ultimately advised Faith Center that it could conduct its "Wordshop" but not its "Praise and Worship" session. The district court enjoined the County's policy because it was likely to result in impermissible viewpoint discrimination. *Faith Ctr. Church Evangelistic Ministries v. Glover,* 2005 WL 1220947, at *1 n. 1 (N.D.Cal.2005).

A divided panel disagreed. The majority declared that "[p]ure religious worship ... is not a secular activity that conveys a religious viewpoint on [an] otherwise permissible subject matter." *Faith Ctr.*, 462 F.3d at 1210. Thus, religious worship "is not a viewpoint but a category of discussion," and a "blanket exclusion of religious worship services from the forum is [a permissible one] based on the content of speech." [2] *Id.* at 1211. Judge Tallman dissented, accurately describing

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[2] Judge Karlton wrote separately to criticize the Supreme Court's decisions in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001), and *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), for the "majorities' disdain of the Jefferson model" and "belief that religious values enhance rather than endanger society." *Faith Ctr.*, 462 F.3d at 1215 (Karlton, J., concurring). He then observed:

It may be that the majority of the Supreme Court really has doubt about the ability to distinguish between religious practice and secular speech. If so, they need only leave their

the County as having "draw[n] an arbitrary line in the sand." *Id.* at 1217 (Tallman, J., dissenting).

II

Beginning with *Widmar v. Vincent,* 454 U.S. 263, 267, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), the Supreme Court has consistently held that once the government establishes a forum open generally to use by the public, it "assume [s] an obligation to justify its discriminations and exclusions under applicable constitutional norms." Under these norms, the government must grant both religious and non-religious groups access to the forum on equal terms. In other words, the government can exclude religious speech only if the content of that speech is not germane to the purposes of the forum or if the expressive activity violates standard time, place, and manner restrictions on the forum's use. *See Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 515 U.S. 819, 830, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). But the government cannot exclude religious speech simply because of its religious character.

The panel majority, however, authorized the County to do just that. It upheld the County's policy prohibiting the use of its library meeting rooms for "religious services" even though those rooms were otherwise generally open for "educational,

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chambers, go out in the street and ask the first person they meet whether in the instant case the conduct is religious in character. It is simply untenable to insist that there is no difference between a prayer and e.g. political speech. To coin a phrase, one can only pray for the court's enlightenment.
Id. at 1216.

cultural and community related meetings, programs and activities." "Religious services" undeniably fall within the broadly stated purpose of the forum, and Faith Center's worship services indisputably complied with all of the time, place and manner regulations governing use of the meeting room. In other words, the County's sole basis for excluding Faith Center from the library was the religious character of its speech activities.

By permitting the County to "justify its discrimination[ ] and exclusion [ ]" on the ***897** religious nature of the speech, *see Widmar,* 454 U.S. at 267, 102 S.Ct. 269, the majority has effectively relegated religious worship to an inferior status vis-à-vis community and cultural speech that claims a secular component. This disparate treatment effectively nullifies the Supreme Court's statement in *Widmar* that "religious worship and discussion ... are forms of speech and association protected by the First Amendment," *id.* at 269, 102 S.Ct. 269, and runs counter to the equal access cases that follow *Widmar. See Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001); *Rosenberger,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700; *Lamb's Chapel v. Ctr. Moriches Sch. Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

A

In *Widmar,* the University of Missouri-Kansas City had enacted a policy governing access to university facilities that was uncannily similar to the policy here: It barred the use of university buildings, which were generally open to use by student groups, "for purposes of religious worship or religious teaching." *Widmar,* 454 U.S. at 265 n. 3, 102 S.Ct. 269. Pursuant to this policy, the university denied an evangelical

student group permission to use university facilities, in part because some of its activities consisted of religious worship.[3] *Id.* at 265, 102 S.Ct. 269. The Court held that this type of discrimination against groups seeking to engage in "religious worship and discussion" was improper because "[t]hese are forms of speech and association protected by the First Amendment." *Id.* at 269, 102 S.Ct. 269.

Given the close parallels between the policy and expressive activity involved in this case and those at issue in *Widmar,* the panel should have summarily affirmed the district court. The classrooms in *Widmar* were open broadly to the university community just as the library's rooms here were open broadly to community and cultural groups. Like the student group in *Widmar,* the church here sought access for both worship and non-worship speech activities. As in *Widmar,* there was no constitutional basis for distinguishing between these forms of speech.

As the Court has explained in subsequent decisions, *Wid-mar's* equal access rule imposes two requirements. First, once the

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[3] The group's meetings generally consisted of the typical components of an evangelical worship service: "prayer, hymns, Bible commentary, and discussion of religious views and experiences." *Widmar,* 454 U.S. at 265 n. 2, 102 S.Ct. 269. In his dissent, Justice White argued, and the majority appears to have accepted, that the student group's meeting was properly described as religious worship. *Compare id.* at 269-70, 102 S.Ct. 269 *with id.* at 283, 102 S.Ct. 269 (White, J., dissenting).

government has opened a limited forum, it "must respect the lawful boundaries it has itself set" and "may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum." *Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510 (internal quotations omitted). Second, even if the exclusion reasonably relates to the purpose of the forum, any restriction must be viewpoint neutral. *Lamb's Chapel,* 508 U.S. at 397-98, 113 S.Ct. 2141. The religious character of the speech is simply irrelevant to both of these requirements.

Thus, in *Lamb's Chapel,* where a school district had opened its property for "social, civic, and recreational uses" but prohibited groups from using its property for "religious purposes," 508 U.S. at 387, 113 S.Ct. 2141, the Court held that the district had applied its policy unconstitutionally when it ***898** refused to grant access to the forum to a group wishing to show a film dealing with family issues and child rearing from a religious perspective, *id.* at 393-94, 113 S.Ct. 2141. The film "dealt with a subject otherwise permissible under [the school district's policy], and its exhibition was denied solely because the series dealt with the subject from a religious standpoint." *Id.* at 394, 113 S.Ct. 2141. Denial of access based on the religious nature of the speech constituted impermissible viewpoint discrimination.[4]

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[4] Although the Court did not reach the issue, it subsequently implied that it would also have found the school district's exclusion unreasonable given the purposes of the forum. As the Court noted, the only reason the group sponsoring the film had not qualified as "a social or civic organization" under the school district's rules was because of its "religious purposes," which, of course, it had held to be

Similarly, in *Rosenberger*, the Court held that the University of Virginia's policy of denying funds to student newspapers with "religious editorial viewpoints" violated the First Amendment because the university had excluded a particular perspective on "subjects ... otherwise within the approved category of publications." 515 U.S. at 831, 115 S.Ct. 2510. It was irrelevant both that some of the "viewpoints" were uniquely religious and lacked a secular counterpart and that the university's restriction, which barred all uniquely religious content, excluded "an entire class of viewpoints." *Id.* As the Court noted, "exclusion of several views ... is just as offensive to the First Amendment as the exclusion of only one." *Id.*

In *Good News Club*, the Court confirmed that even "quintessentially religious" speech, including worship and evangelization, cannot be excluded from a forum so long as that speech is reasonably related to the purposes of the forum. 533 U.S. at 111, 121 S.Ct. 2093. In that case, the school had set aside the forum for use by "any group that promote[s] the moral and character development of children." *Id.* at 108, 121 S.Ct. 2093 (internal quotations omitted) (alteration in original). Although the speech at issue had components that could be described only as "religious worship," the Court concluded that it "address[ed] a subject otherwise permitted under the rule ... from a religious standpoint." *Id.* at 109, 121 S.Ct. 2093. Because there was no difference between the Club's invocation of Christianity and "the invocation of teamwork, loyalty, or patriotism by other associations" in addressing a matter

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constitutionally irrelevant. *Rosenberger*, 515 U.S. at 832, 115 S.Ct. 2510.

germane to the purpose of the forum, the school could not rely on the religious nature of the former in excluding the Club. *Id.* at 111-12, 121 S.Ct. 2093.

Faith Center's speech here fits squarely within the protections erected by these cases. As noted above, religious services-both as religious expression per se, *see, e.g.*, J.S. BACH, *Mass in B Minor,* and as vehicles for moral and theological teaching-bear a reasonable relationship to the "educational, cultural and community" purposes for which the County has set aside its library meeting rooms. Given this relationship, the County's express exclusion of religious speech-and only religious speech-is a pure viewpoint-based exception and is plainly prohibited by the First Amendment.

B

The majority attempts to avoid the great weight of these cases by arguing that "mere religious worship" is not a viewpoint but a separate category of discussion distinguishable from other religious speech. ***899** The majority argues that, unlike the religious speech at issue in the Supreme Court's equal access jurisprudence, "mere religious worship" has no secular counterpart on which it provides a religious perspective; in other words, under the majority's view, whether religious speech offers a viewpoint is judged entirely by a secular standard, and the absence of a secular counterpart means that "mere worship" can be treated as a separate, and perhaps unique, category of speech. *See Faith Ctr.*, 462 F.3d at 1210-11. The majority further argues that the Court itself recognized "mere religious worship" as a separate-and constitutionally inferior-category of speech in *Good News Club. See id.* at 1209. None of these objections survives close

scrutiny.

First, *Widmar* rejects outright any attempt to make "a distinction between the kinds of religious speech explicitly protected by [its] cases and a new class of religious speech act[s] constituting worship." *Widmar,* 454 U.S. at 269 n. 6, 102 S.Ct. 269 (citation and internal quotations omitted) (second alteration in original); *see also id.* at 284-86, 102 S.Ct. 269 (White, J., dissenting). The Court noted "at least" three difficulties with the proposed distinction: (1) it lacks intelligible content; (2) it is not "within the judicial competence to administer"; and (3) it is a constitutionally irrelevant basis for distinguishing among different types of religious speech. *Id.* at 269, 102 S.Ct. 269 n. 6. Even if *Widmar's* express rejection of the panel majority's distinction were not dispositive, it would still collapse under the weight of these three objections.

Second, *Rosenberger* undermines the viability of the content/viewpoint distinction in this context. The Court noted in that case that "discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination." *Rosenberger,* 515 U.S. at 830-31, 115 S.Ct. 2510 (citing *R.A.V. v. St. Paul,* 505 U.S. 377, 391, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)). Although religion can be classified both as a subject area and as a viewpoint, the Court explained that exclusion of religious speech constitutes impermissible viewpoint discrimination because it involves "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831, 115 S.Ct. 2510. Notably, the Court treated speech activity that lacked a secular corollary,

such as proselytization, no differently from that which offered a religious viewpoint on an otherwise secular topic.

Within the *Rosenberger* framework, the panel majority simply has no basis for drawing the line at worship in this context. The library has opened its rooms for cultural and community activities, an exceptionally broad category of speech that includes religious speech. The County acknowledges that religion as such is an "otherwise permissible category" that falls within the scope of the forum's stated purposes, but it expressly bars a particular subset of constitutionally protected speech-worship-that addresses religious, not to mention community, social, moral, and educational, matters from a particular viewpoint.[5]

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[5] The content/viewpoint distinction may have some explanatory power, but in only in very narrow circumstances, such as in public schools or other fora opened for very limited purposes. For example, even though a public school could not permit Good News Club to make announcements over the public address system while forbidding the Hillel Society from doing so, it could forbid them both from using the PA system to conduct devotionals. The time for announcements is dedicated time, and the school may restrict the content of the announcements to germane when-and-where information. Similar content-based restrictions could be imposed if the forum has been established for a very narrow purpose, such as the moral education of children, as in *Good News Club*.
These considerations are not relevant here. Contra Costa has opened the library to the broadest of audiences "for meetings, programs, or activities of educational, cultural or

***900** There are, of course, perfectly permissible means by which categories of speech-including worship activities-could be excluded from the library. For example, if the library had set aside its meeting rooms for book clubs, it could certainly exclude every other category of expressive activity that did not fall within the purposes of the forum. The library could exclude worship services that were not book clubs, just as it could exclude political debates and city council meetings. What it could not do is exclude book clubs discussing the Koran, the Torah, or the Tibetan Book of the Dead. Or the library might open its meeting rooms broadly, while prohibiting food or drink. That policy would exclude meetings at which communion might be served, or a Seder celebrated, or prashad distributed, just as it would exclude serving refreshments at a Boy Scout Court of Honor or tea at a meeting of the Garden Club. What the library cannot do is permit food and drink *except* when it is consumed in connection with religious services. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). But that is exactly what the library has done here: It has opened the forum to all community and cultural speech *except* such speech that encompasses a viewpoint that is unique to religion.

Third, contrary to the panel majority's view, *Good News Club* does not support the separation of "mere worship" from other religious speech. In making this distinction, the majority relies

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community interest." It is hard to conclude that Faith Center's activities-worship or otherwise-don't fall well within those expansive guidelines.

heavily on footnote four of the Court's opinion in *Good News Club,* which it reads as distinguishing between the Club's activities and "mere religious worship." *See Faith Ctr.*, 462 F.3d at 1209. However, any distinction drawn by the Court makes sense only in the context of the narrowly defined forum in that case.

In *Good News Club,* New York had adopted regulations under which school boards could open the schools to public use. 533 U.S. at 102, 121 S.Ct. 2093. One of the authorized purposes was for "teaching morals and character development to children." *Id.* at 108, 121 S.Ct. 2093. Nevertheless, the school rejected a request by the Good News Club to use the school's facilities for that purpose. *Id.* at 103-04, 121 S.Ct. 2093. The Court found that it was "clear that the Club teaches morals and character development to children," and held that it was irrelevant that the Club offered a religious perspective on that subject. *Id.* at 108, 110-12, 121 S.Ct. 2093. The Court held that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Id.* at 112, 121 S.Ct. 2093.

In a footnote responding to Justice Souter's dissent, the Court "conclude[d] that the Club's activities [did] not constitute mere religious worship, divorced from any teaching of moral values." *Id.* at 112, 121 S.Ct. 2093 n. 4. The Court was pointing out only that the Club's activities were reasonably related to the purposes of the limited forum; in that sense, the Club's activities were not "mere religious worship" lacking any connection to the purpose of the forum. If the Club had attempted to conduct worship that contained no references ***901**

to moral and character development in children, the school could have denied permission for such use, just as it could have denied permission for a "mere political discussion" or a "mere Tupperware party" also devoid of such content. The relevant distinction was between "mere religious worship" and worship that bore a relationship to the narrow purposes of the dedicated forum, not between a category of fully protected religious speech with a secular component or counterpart and speech that is less protected because it is exclusively religious. Here, the County has opened its library meeting rooms *generally* to community groups for a wide range of cultural and community activities; the distinction between "mere religious worship" and other forms of religious speech is thus utterly irrelevant. Whatever "mere religious worship" involves, it is both a cultural and a community activity and as such certainly constitutes an "otherwise permissible subject[ ]" under the County's policy. *See Good News Club,* 533 U.S. at 112, 121 S.Ct. 2093.

III

The likely effect of the majority's rule in the real world confirms that it ratifies viewpoint-based discrimination and raises profound Establishment Clause concerns. The Court has "consistently and firmly deprecated" government policies favoring one religion over another, *Larson v. Valente,* 456 U.S. 228, 246, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982), and subjects to strict scrutiny policies that "facially differentiate[ ] among religions," *Hernandez v. Commissioner,* 490 U.S. 680, 695, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989). The rule established by the majority violates these principles by privileging some religious groups over others.

That the County's policy treats religious groups differently is clear from even a brief survey of American religious denominations. For example, under the majority's test, Evangelicals and Unitarian groups should generally be granted access: Moral teaching is integral to their services, as are fellowship, singing, and other distinctly non-worship activities. Liturgically oriented denominations such as Episcopalians and Catholics will find themselves subject to greater burdens: The worship elements of their services are more distinct and easily severable from the non-worship elements, and they have more services (such as the Daily Office in the Catholic tradition) that can be characterized in their entirety as "mere worship."

Furthermore, under the majority's approach, a diverse range of religions may use the County's library meeting rooms for "religious services" without fear of County censorship because their services cannot be characterized as "mere worship." The last half-century has seen a flowering in this country of non-theistic religions that either do not recognize or do not worship any divine being. Rather, these religions-including certain strands of Buddhism, Confucianism, and newer groups such as the American Ethical Union (or Ethical Humanism)-concern themselves primarily, or even exclusively, with ethical principles.

Although each of these groups conducts "religious services" that may be highly ritualistic, none of them-by definition-engages in anything that could plausibly be called "mere worship." Thus, whether the County was confronted with a Buddhist group desiring to conduct a religious service-before a statue of the Buddha and surrounded by candles and incense-consisting of meditation on the Eightfold

Path or an Ethical Humanist group scheduling a service devoted to "consecrating [participants'] lives to acting in ways that honor [their] primary commitment to respect*902 the worth and dignity of each person and to create human institutions which enable societies ... to do so as well," Jone Johnson Lewis, *Ethical Culture as Religion,* http:// www. aeu. org/ religion. html (last visited Feb. 22, 2006), it would have to grant the application under the majority's rule permitting the exclusion only of "mere worship." After all, neither group would identify its activities as worship, nor, indeed, does either engage in anything akin to traditional, Judeo-Christian "worship." Yet to the average outside observer, both services would likely appear indistinguishable from the activities the majority calls "mere worship," and indeed, both groups would view their activities as quintessential religious activity. That one group would be granted access to engage in such activity and another denied is patently unconstitutional. As the Supreme Court recognized over four decades ago, disparate treatment of theistic and non-theistic religions is as offensive to the Establishment Clause as disparate treatment of theistic religions. *See Torcaso v. Watkins,* 367 U.S. 488, 495, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961); *see also Lee v. Weisman,* 505 U.S. 577, 617, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (Souter, J., concurring) (noting that a policy that treats theistic religions similarly is not sufficiently universal to avoid Establishment Clause concerns because many religions are non-theistic).

IV.

The majority's rule permits government entities to deny access to a limited public forum made generally available to community groups solely on the basis of the uniquely religious

viewpoint of the speaker. In doing so, the majority has jettisoned three decades of equal access jurisprudence, created a constitutionally inferior category of religious speech, and given governments throughout our circuit license to favor certain religions over others. I respectfully dissent from the order denying rehearing en banc.

UNITED STATES CONSTITUTION

AMENDMENT I:

FREEDOM OF SPEECH, RELIGION, PRESS, PETITION AND ASSEMBLY

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV:

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians

not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal

and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

THE BOARD OF SUPERVISORS OF CONTRA COSTA COUNTY, CALIFORNIA

Adopted this Resolution on December 14, 2004, by the following vote:

AYES:	SUPERVISORS GIOIA, UILKEMA, GREENBERG, DESAULNIER
NOES:	NONE
ABSENT:	SUPERVISOR GLOVER
ABSTAIN:	NONE

RESOLUTION NO. 2004/655

SUBJECT: **IN THE MATTER OF ADOPTING A POLICY FOR THE USE OF MEETING ROOMS IN LIBRARIES**

Upon recommendation of the County Librarian, this Board adopts the following policy and rescinds all previously adopted policies and rules and regulations (including Resolution No. 93/525 in its entirety) for the use of meeting rooms in libraries:

Contra Costa County Library

POLICY FOR THE USE OF MEETING ROOMS IN LIBRARIES

It is the policy of the Contra Costa County Library to encourage the use of library meeting rooms for educational, cultural and

community related meetings, programs, and activities.

NO-FEE USAGE

Non-profit and civic organizations, for-profit organizations, schools and governmental organizations offering meetings, programs, or activities of educational, cultural or community interest may use the meeting room free of charge for meetings that are open to the general public, for which no admission fee is charged, and at which no soliciting or selling is done.

FEE-BASED USAGE

Non-profit and civic organizations, for-profit organizations, schools and governmental organizations may use the meeting room for a fee for meetings that are closed to the general public, for which an admission fee is charged, or at which soliciting or selling takes place.

EDUCATIONAL USE

Library meeting rooms are available to schools only for special meetings, programs, or activities. They may not be used for instructional purposed as a regular part of the curriculum.

RELIGIOUS USE

Library meeting rooms shall not be used for religious services.

APPLICATIONS FOR USE

All groups request use of a library meeting room must fully complete an application form for each use.

RULES FOR USE

The County Librarian shall promulgate rules for the implementation of this policy. Such rules may contain branch specific rules. The County Librarian may deny any application or revoke any permission previously granted when such application or permission is for a use not permitted by this policy, when the applicant has violated the rules promulgated by the County Librarian, or when the meeting room is needed for library purposes.

cc: County Librarian
County Administrator
County Counsel

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Supervisors on the date shown.

ATTESTED: December 14, 2004

JOHN SWEETEN, Clerk of the Board of Supervisors and County Administrator

By: s/ John Sweeten Deputy

Supreme Court, U.S.
FILED
AUG 07 2007
OFFICE OF THE CLERK

No. 06-1633

IN THE

Supreme Court of the United States

FAITH CENTER CHURCH EVANGELISTIC MINISTRIES AND HATTIE HOPKINS,
Petitioners,

v.

FEDERAL D. GLOVER, MARK DESAULNIER, JOHN M. GOIA, MILLIE GREENBERG, JOHN W. SWEETEN, ANNE CAIN, PATTY CHAN, LAURA O'DONAHUE AND GAYLE B. UILKEMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should review the Ninth Circuit's narrow and fact-specific holding that when a religious entity itself designates a class of speech as "pure religious worship," that speech may be treated as a separate "subject matter" for purposes of limited forum analysis.

2. Whether this Court should review the Ninth Circuit's application of well-settled forum-law principles to the factual circumstances of this case.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This case is about the unusual circumstance in which a religious entity seeking access to a limited public forum *itself* describes its proposed use as consisting entirely of pure religious worship. Because the narrow and fact-specific decision below relies critically on Faith Center's *own* distinction between its religious worship services and its other religious speech, it does not implicate – and would not give this Court a chance to address – any broader issues that arise when a court or other governmental entity attempts to draw a principled line between religious worship and religious speech. Nor does it conflict with any decision of another court of appeals, for the simple reason that the other federal circuits have yet to address the uncommon factual situation presented here. There is no reason for this Court to grant certiorari review.

STATEMENT OF THE CASE

A. Factual Background

Contra Costa County ("County") generally makes its public library meeting rooms available to the public during normal operating hours "for educational, cultural and community related meetings, programs and activities." Pet. App. 3a. But the County restricts use of its public library meeting rooms in various respects. Meeting rooms "are available to schools only for special meetings, programs or activities," and may not be used for "instructional purposes as a regular part of the curriculum." *Id.* In addition, organizations that charge admission for their meetings, or engage in soliciting or selling during meetings, must pay a fee to use the meeting rooms. *Id.* And the County does not

permit its library meeting rooms to be used for "religious services."[1]

In order to monitor compliance with these policies, the County requires that groups submit an application form for each requested use of a public library meeting room, identifying the applicant and the purpose of the meeting. *Id.*

This case began in May 2004, when petitioner Faith Center Church, led by Pastor Hattie Hopkins, submitted applications to use the meeting room of the Antioch Branch Library ("Library") on May 29 and July 31, 2004. The applications described the purpose of the proposed Faith Center meetings as "Prayer, Praise and Worship Open to the Public, Purpose to Teach and Encourage Salvation thru Jesus Christ and Build up Community." *Id.* at 4a. By holding these worship services in a public library rather than a church – and doing so on a regular basis, every other month, *id.* at 6a – Pastor Hopkins hoped to reach individuals "who need to hear about the gospel of Jesus Christ but who may never enter a traditional church building." *Id.* at 4a.

Faith Center advertised its first meeting with a flyer stating:

> Coming to Antioch, California, on May 29, 2004, where the power of God would be moving to bring miracles into your life. "For this is the hour of the believer," thus saith the Lord, for divine impartation of spiritual gifts, and empowerment, for the body of Christ to move forward in total victory. Come and receive your blessing!

---

[1] The County's policy concerning religious expression in library meeting rooms has been amended since the start of this litigation. At the time Faith Center submitted its applications in May 2004, County policy prohibited use of library meeting rooms for "religious purposes." The current policy, adopted in December 2004, is substantially narrower, excluding only "religious *services*" from the meeting rooms. Pet. App. 3a (emphasis added).

Id. at 4a-5a. The flyer went on to divide Faith Center's activities into two parts: a "Wordshop" from 11:00 a.m. to 12:00 p.m., discussing "how to pray fervent, effectual prayers that God hears and answers," and an afternoon "Praise and Worship" service from 1:00 p.m. to 3:00 p.m., with a sermon by Pastor Hopkins. *Id.* at 5a. Critically, Faith Center itself understood the afternoon session to be devoted to "pure religious worship services." *Id.* at 8a.

At the end of the May 29 meeting, the Library advised Faith Center that its proposed meetings were prohibited by the County policy concerning performance of religious services in library meeting rooms. The County later cancelled Faith Center's planned July 31 meeting.

B. Proceedings Below

On July 30, 2004, Faith Center sued the County, seeking to enjoin enforcement of the restriction on religious services. Before the district court, the County agreed that Faith Center's proposed morning sessions – "Wordshops" like that described in the flyer for the May 29 event – involved the kind of religious speech and activity to which the County has opened its library meeting rooms. *Id.* at 5a-6a. But the County viewed the afternoon "Praise and Worship" sessions as "religious *services*" falling outside the general purpose for which the meeting rooms had been opened to the public. *Id.* at 7a.

The district court, relying in part on the Second Circuit's now-vacated judgment in *Bronx Household of Faith v. Board of Education*, 331 F.3d 342 (2d Cir. 2003), granted Faith Center's motion for a preliminary injunction. Pet. App. 77a-80a; Pet. 6-7. The district court concluded that religious "worship" cannot be distinguished from other forms of religious speech, and that exclusion of religious worship from a forum open to other religious speech would constitute impermissible viewpoint discrimination. Pet. App. 8a.

The Ninth Circuit reversed. The Court of Appeals began by acknowledging that religious worship is a form of speech protected by the First Amendment. *Id.* at 12a. But the Constitution, as the court explained, "does not guarantee that all forms of protected speech may be heard on government property." *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985)). The question, the Ninth Circuit reasoned, was whether the Library meeting room constituted a "designated public forum," as Faith Center argued, so that a content-based restriction on religious services would be presumptively impermissible, or a "limited public forum," from which the County could exclude certain subject matters so long as the exclusions are reasonable in light of the purposes of the forum. Pet. App. 14a.

Applying this Court's leading cases on forum analysis, the Ninth Circuit held that the County had established only a limited public forum in its library meeting rooms. The court analyzed the forum at issue by examining "'the policy and practice of the government, the nature of the property and its compatibility with expressive activity, and whether the forum was designed and dedicated to expressive activity.'" *Id.* at 15a (quoting *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998) (citing *Cornelius*, 473 U.S. at 802-03)). In particular, the court relied on the following factors in finding that the Library meeting room was a limited public forum:

- that the County "excludes schools from using the meeting room 'for instructional purposes as a regular part of the curriculum,'" *id.* at 17a;
- that the County "excludes organizations who wish to engage in 'religious services,'" *id.*;
- that the County "requires a potential user to submit an application describing the intended use and identifying the applicant," *id.*;

- that the County requires applicants to pay a fee "for meetings that are closed to the general public, for which an admission fee is charged, or at which soliciting or selling takes place," *id.*; and
- that the forum in question is located in a public library, which is "quintessentially 'a place dedicated to quiet, to knowledge, and to beauty," *id.* at 18a (quoting *Brown v. Louisiana*, 383 U.S. 131, 142 (1966), and "whose very purpose is to aid in the acquisition of knowledge through reading, writing and quiet contemplation," *id.* (internal quotations and citation omitted).

Having concluded that the Library meeting room was a limited public forum, the Ninth Circuit next applied the legal standard that governs such fora, which permits the government to restrict access "'based on subject matter . . . so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'" *Id.* (quoting *Cornelius*, 473 U.S. at 806). The court acknowledged that "[t]he distinction between regulation on the basis of subject matter and viewpoint . . . 'is not a precise one.'" *Id.* at 22a (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995)). It concluded, however, that "pure religious worship" is not a viewpoint, but rather a separate "category of discussion," excludable from a limited public forum as a distinct "subject matter." *Id.* at 29a.

Critical to the court's decision was Faith Center's admission before the district court that its "afternoon activities constituted pure religious worship services." *Id.* at 28a. Faith Center argued before the Ninth Circuit that religious worship could not be distinguished meaningfully from other forms of religious speech. But that issue, the Ninth Circuit reasoned, was not presented by this case: "That distinction . . . was already made by Faith Center itself

when it separated its afternoon religious worship services from its morning activities." *Id.* at 35a.

For the same reason, the Ninth Circuit distinguished this case from *Bronx Household of Faith v. Board of Education*, 331 F.3d 342 (2d Cir. 2003) (*Bronx Household II*), which at the time was governing Second Circuit law. *See* Pet. App. 30a-31a. Unlike the proposed worship service in this case – expressly distinguished by Faith Center from its other religious speech – Bronx Household of Faith's proposed meetings "did not 'constitute only religious worship, separate and apart from any teaching of moral values.'" *Id.* at 30a (quoting *Bronx Household II*, 331 F.3d at 354). Rather, like the religious activities considered by this Court in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), they "combin[ed] teaching with 'elements of worship.'" *Id.* (quoting *Good News Club*, 533 U.S. at 138 n.3.). *Bronx Household II* was "inapposite" here, the court concluded, because Faith Center's afternoon activities were not "simply . . . 'elements of worship' that further secular goals," but "consisted entirely of praise and religious worship." *Id.* at 30a-31a.

Because the County's exclusion of religious services from its public library meeting rooms was a permissible subject-matter restriction that was reasonable in light of the purpose of the limited public forum the County had created, the Ninth Circuit reversed the district court's injunction. Faith Center's petition followed.

REASONS FOR DENYING THE WRIT

Faith Center seeks review primarily on the ground that the Ninth Circuit decision distinguishes religious worship from other forms of religious speech, creating a conflict with the decision of the Second Circuit in *Bronx Household II*. But there simply is no conflict between the Ninth Circuit decision and *Bronx Household II*, and the Second Circuit recently vacated its judgment in that case. In any event, the Ninth Circuit's distinction between religious worship and

other religious speech turns critically on a unique factual feature of this case – Faith Center's willingness to draw that distinction itself – and thus has no broader import for other cases. The rest of the Ninth Circuit's decision involves no more than application of settled principles of forum analysis to the particular facts presented. Nothing about this case warrants certiorari review.

I. THERE IS NO CONFLICT BETWEEN THE NINTH AND SECOND CIRCUITS.

Faith Center rests its argument for certiorari primarily on an alleged conflict between the decision below and the holding of the Second Circuit in *Bronx Household II*. There is no conflict between those decisions, however, because they address entirely different factual scenarios. Moreover, since Faith Center's petition was filed, the Second Circuit has vacated the injunction affirmed in *Bronx Household II*, removing any possible basis for asserting a circuit conflict on whether religious worship services may be excluded from a limited public forum.

As the Ninth Circuit held, *Bronx Household II* presented no actual conflict with the decision below. In *Bronx Household II* – unlike this case – the religious activities in question were *not* designated "pure religious worship," but rather combined "elements of worship" with teaching, fellowship and other religious speech. Pet. App. 30a-31a; *Bronx Household II*, 331 F.3d at 347, 354. On that particular factual basis, the Second Circuit found it likely that exclusion of the activities in question would constitute impermissible viewpoint discrimination. *Bronx Household II*, 331 F.3d at 354. Indeed, the Second Circuit specifically left unresolved the question whether pure religious worship could be treated as an entirely distinct type of activity or speech and thus excluded from a limited public forum. *Id.* at 355. The Second Circuit had no occasion to address the factual situation that would be presented – as it was in this

case – if a church itself conceded that its activities constituted pure religious worship.

In any event, there is certainly no ground to argue for a conflict now that the Second Circuit has vacated its judgment in *Bronx Household II*. The Second Circuit revisited *Bronx Household II* when the New York Board of Education modified its policy to exclude only "religious worship services," and notified Bronx Household that its use of the public schools for regular worship services was prohibited under the revised policy. *See Bronx Household of Faith v. Bd. of Educ.*, -- F.3d --, 2007 WL 1880477, at *4-*5 (2d Cir. July 2, 2007) (*Bronx Household III*). Bronx Household sued, and the district court granted the church's motion for summary judgment, converting the preliminary injunction of *Bronx Household II* into a permanent injunction enjoining the school board from enforcing its newly revised policy. *Id.* at *5. On appeal, Bronx Household conceded, as did Faith Center in this case, that its activities constituted a "worship service." *Id.* Thus, in *Bronx Household III* the Second Circuit was presented for the first time with the question raised in this case: whether religious worship services – as defined by the religious entity in question – may be excluded from a limited public forum as a distinct category of expression.

On July 2, 2007, the Second Circuit ruled, vacating the permanent injunction but failing to resolve the underlying substantive question. Two judges voted to vacate the injunction, but on different grounds: one because the exclusion of religious services was viewpoint-neutral and thus permissible, and one because the issue was not ripe for decision. *Id.* at *1, *8, *14. The third judge would have affirmed the injunction on the grounds that exclusion of religious worship constituted unconstitutional viewpoint discrimination. *Id.* at *1, *28. Thus, no injunction remains in place in *Bronx Household* – nullifying any conflict with the decision below – and the Second Circuit has yet to decide

whether activity that is concededly pure religious worship may be excluded from a limited public forum.

In its per curiam opinion, the Second Circuit noted that "the City is free to adopt" and enforce its revised policy – which mirrors the policy at issue in this case – and invited the parties to pursue their case to a final resolution on the merits. *See id.* at *1. Indeed, the court encouraged the parties to seek expedited review before the same panel. *Id.* If the Second Circuit ultimately adopts a position that conflicts with that taken by the Ninth Circuit, this Court can consider at that time whether the conflict warrants review. But the fact that the Second Circuit is foreshadowing a decision on the merits of the question presented here only confirms that there is no present conflict between the Second and Ninth Circuits, and thus no basis for certiorari review.

II. THE NINTH CIRCUIT HELD ONLY THAT WHEN A RELIGIOUS ENTITY ITSELF DESIGNATES AN ACTIVITY AS PURE RELIGIOUS WORSHIP, THAT ACTIVITY MAY BE EXCLUDED FROM A LIMITED PUBLIC FORUM.

Faith Center also argues that the decision below conflicts with decisions of this Court, principally *Widmar v. Vincent*, 454 U.S. 263 (1981), because it rests on an impermissible distinction between religious worship services and other types of religious speech. Pet. 13-14, 19-21. In fact, the Ninth Circuit's holding does not conflict with *Widmar* or any of this Court's cases addressing speech that expresses a religious viewpoint on a secular subject. That is because in this case, unlike those cited by respondent, Faith Center itself has drawn the distinction between its worship services and its other religious speech, and has conceded that the activity

in question – the afternoon "Praise and Worship" session – falls on the pure worship side of the line.[2]

As this Court suggested in *Widmar*, 454 U.S. at 269 n.6, and the Ninth Circuit recognized below, Pet. App. 35a-36a, defining and then judicially administering a meaningful distinction between religious worship and other forms of religious speech may be difficult and even constitutionally problematic. But as the Ninth Circuit also recognized, that issue simply is not presented here because, in this case, the religious entity *itself* has drawn the distinction on which the County is relying:

> The distinction to be drawn here . . . one between religious worship and virtually all other forms of religious speech [is] one that the government and the courts are not competent to make. That distinction, however, was already made by Faith Center itself when it separated its afternoon religious worship service from its morning activities. . . . The County may not be able to identify whether Faith Center has engaged in pure religious worship, but Faith Center can and did.

Id.

That unusual fact takes this case outside the concerns raised by the Court in *Widmar*, and distinguishes it from *Good News*, which involved religious activity that combined

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[2] Contrary to petitioners' claim (Pet. 14), the Ninth Circuit did not hold that religious worship is unprotected by the First Amendment. Indeed, the Ninth Circuit expressly held to the contrary: "We conclude that Faith Center engaged in protected speech when its participants met in the Antioch Library for prayer, praise and worship." Pet. App. 11a. The question before the Ninth Circuit was not whether Faith Center's religious worship was protected by the First Amendment, but whether it constituted a separate "subject matter" that may be excluded from a *limited public forum*, just as other forms of protected speech may be excluded. *Id.* at 19a-21a; *see infra* Part III (discussing limited public forum doctrine).

elements of religious worship with other forms of speech expressing a religious perspective on the secular subject of moral and character development. *Good News Club*, 533 U.S. at 109-12; *see also Bronx Household II*, 331 F.3d at 354 (ruling is "confined to the district court's finding" that the religious activities in question are "not simply religious worship, divorced from any teaching of moral values or other activities permitted in the forum"). This case provides no occasion for addressing the problems raised when the *government*, rather than a church itself, attempts to distinguish between religious worship and other forms of religious speech.

Because the Antioch Library's meeting room is a limited public forum, the County is entitled to restrict access based on reasonable subject-matter distinctions. *See Good News Club*, 533 U.S. at 106-07. The Ninth Circuit's holding that the County could rely on a distinction between religious worship services and other religious speech is narrow and fact-specific, resting critically on the ground that Faith Center itself divided its activities into those groupings. Nothing about that narrow holding, resting on an unusual factual predicate, warrants certiorari review.

III. THE NINTH CIRCUIT'S FORUM ANALYSIS IS IN ACCORD WITH THE DECISIONS OF THIS COURT AND OF THE COURTS OF APPEALS.

Faith Center argues that the Ninth Circuit's designation of the Library meeting room as a limited public forum is mistaken and in conflict with decisions of this Court and other courts of appeals. Not so. The Ninth Circuit faithfully applied well-established Supreme Court precedent regarding forum analysis to the specific factual circumstances before it. That other courts of appeals have reached different conclusions when applying the same legal standard to different facts is hardly surprising, and does not in any way suggest that the lower courts are divided or confused when it comes to identifying the governing principles in this area.

1. This case involves the distinction between a designated public forum – "public property which the State has opened for use by the public as a place for expressive activity" – and a limited public forum – a forum not traditionally open to expressive activity that nevertheless has been opened to certain groups for the discussion of certain topics. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). As this Court has made clear, drawing the line between the two types of fora is an extremely fact-sensitive enterprise, turning on such factors as the government's intent in creating the forum, the "policy and practice of the government" with respect to the forum, and "the nature of the property and its compatibility with expressive activity." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

There is no question that the Ninth Circuit here correctly identified and applied that well-established legal standard. Pet. App. 13a (citing *Cornelius*). The court examined all of the relevant factors under the correct legal principles before concluding that the County had not evinced an intent (or practice) of opening public library meeting rooms "for indiscriminate use by the general public." *Perry*, 460 U.S. at 47. The Ninth Circuit's analysis turned on the specific facts before it: that, in addition to excluding religious services, the County's policy also "excludes schools from using the meeting room 'for instructional purposes as a regular part of the curriculum,'" "requires a potential user to submit an application describing the intended use and identifying the applicant," and "requires an applicant to pay a fee for certain proposed uses." Pet. App. 17a. The Ninth Circuit also found it significant that "the County has consistently applied its policy restrictions," and apparently had never "failed to screen an application or . . . granted access to an applicant on a non-policy basis." *Id.* Only after assessing these unique factual circumstances did the Ninth Circuit conclude that "the County has demonstrated its desire to limit access to the library meeting room for certain purposes and speakers." *Id.*

The Ninth Circuit's careful application of settled law to the facts before it does not merit this Court's review.

2. Nor does the decision below present any conflict with cases from other courts of appeals. The variance in *outcomes* cited by Faith Center, *see* Pet. 23-28, is the result of variances in the factual circumstances before the courts, and not any conflict over the legal standard to be applied.

In *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990), for instance, the Third Circuit rested its conclusion that a school district had created a designated public forum on two key facts, neither of which is present here: that the district's definition of its forum was "so vague that [the district] has virtually unlimited discretion in deciding which groups qualify and which do not," and thus could "'arbitrarily deny access . . . to any unfavored student club on the basis of its speech content,'" *id.* at 1374-75 (internal quotation omitted); and that the district had not consistently applied its own restrictions, giving "tenuous and internally inconsistent grounds" for excluding religious activity, *id.* at 1378-79. Indeed, the Third Circuit emphasized that "the basis of [its] holding is narrow," turning on the inconsistent application of purported criteria for entrance to the forum. *Id.* at 1379.

Other decisions cited by Faith Center also rely heavily on inconsistent or selective application of access policies. In *Concerned Women for America, Inc. v. Lafayette County*, 883 F.2d 32 (1989), the Fifth Circuit found that a library had created a public forum where, contrary to its contention that the library was open "only to groups meeting for artistic or educational purposes," the library had in fact allowed a diverse array of groups to use its auditorium, including a potluck luncheon of the National Association of Retired Federal Workers, a meeting of U.S. Navy recruiters, and a meeting of the Oxford Swim Club. *Id.* at 33-34. And in *Grace Bible Fellowship v. Maine School Administrative District No. 5*, 941 F.2d 45 (1st Cir. 1991), although the

school had a stated policy that "access to school facilities should be limited to uses reasonably compatible with the mission and function of the school district in the community," the school in fact opened its facilities to "any group other than to religious organizations." *Id.* at 47.

In the decision below, by contrast, the Ninth Circuit expressly found that the County had applied its library-access policies consistently, to all applicants for library meeting space. Pet. App. 17a ("The record indicates that the County has consistently applied its policy restrictions. Faith Center does not contend that the County has ever failed to screen an application or that the County has granted access to an applicant on a non-policy basis."). That the Ninth Circuit reached a different outcome than the courts cited by Faith Center reflects only this crucial difference in factual circumstances, and not any conflict regarding the governing legal principles.

In *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703, 704, 706 (4th Cir. 1994), also cited by Faith Center, the School Board itself conceded that it had created a public forum by opening its facilities "to a wide array of private, community, religious and cultural organizations, both commercial and nonprofit." The Fourth Circuit thus had no reason even to entertain the idea that the school's facilities might constitute a limited public forum. And the district court decisions cited by Faith Center, Pet. 25-28 – which in any event would not support its claim of circuit-court conflict – likewise reflect no confusion regarding the governing legal standard, but only application of that standard to disparate factual circumstances.[3]

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[3] *See Shumway v. Albany County Sch. Dist. No. One Bd. of Educ.*, 826 F. Supp. 1320, 1325 (D. Wyo. 1993) (school's policy of providing for "open access and use of the district's school facilities by the public, so long as those users did not interfere with school activities" created a public forum); *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704, 708 (M.D. Ala. 1991) (public forum created

3. Faith Center also argues that the Court should grant review in this case in order to adopt a brand new rule of forum law: that in order to create a limited public forum, the government must restrict access to a single category of speakers or subject matter. Pet. 29. Any such rule would be flatly inconsistent with this Court's precedents, which make clear that the government may create a limited public forum for a far broader range of speech. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 824, 829-30 (1995) (university student activities fund treated as limited public forum where fund supports "a broad range of extracurricular student activities that are related to the educational purpose of the University"). It also would have a pronounced chilling effect on the ability of government entities to open their property for a limited category of speech activities: if a government wishes to permit more than one kind of speech, then under Faith Center's proposed rule, it must effectively open a town square in which virtually all speech is permitted.

In any event, and more important here, Faith Center's preference for a new rule of constitutional law is not grounds for granting certiorari. There is no conflict of authority

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when school board's policy was to "allow virtually any group to lease the auditoriums . . . , including churches and other organizations seeking to use the facilities for religious functions"); *Wallace v. Washoe County Sch. Dist.*, 818 F. Supp. 1346, 1350 (D. Nev. 1991) (school had created an open forum where its facilities were open to "community groups" for "worthwhile purposes," and where the school had allowed other religious groups in the past); *Country Hills Christian Church v. Unified Sch. Dist. No. 512*, 560 F. Supp. 1207, 1215 (D. Kan. 1983) (public forum created where school facilities broadly dedicated for use by "recognized community groups"); *Randall v. Pegan*, 765 F. Supp. 793, 796 (W.D.N.Y. 1991) (holding that the school "maintain[ed] an 'open forum policy' toward[] all civic, private and student groups, both religious and nonreligious, who seek to use its facilities during noninstructional hours").

regarding the "one category only" rule advanced by Faith Center, and no justification for this Court's intervention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

FAITH CENTER CHURCH EVANGELISTIC MINISTRIES and HATTIE HOPKINS,

Petitioners,

v.

FEDERAL D. GLOVER, MARK DESAULNIER, JOHN M. GIOIA, MILLIE GREENBERG, JOHN W. SWEETEN, ANNE CAIN, PATTY CHAN, LAURA O'DONAHUE and GAYLE B. UILKEMA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

I. THE GOVERNMENT MAY NOT EXCLUDE RELIGIOUS SPEECH CHARACTERIZED AS "WORSHIP" FROM A FORUM GENERALLY OPEN TO THE PUBLIC.

The Ninth Circuit ruled that the First Amendment allows Contra Costa County to ban certain religious expression whenever it amounts to "religious worship" from a forum the County has generally opened to community groups for a broad spectrum of expression. Religious speech that does *not* amount to "religious worship" is permitted in this forum. The County argues in its Brief in Opposition (Opp.) that its discriminatory policy is constitutional because the Petitioners labeled their own expression as "praise and worship." Opp. at 1, 5, 6, 10. But whether a speaker describes its own expressive activity as "worship," or a government official assigns that label, it is equally unconstitutional to exclude a category of otherwise constitutionally protected speech solely because of its theological significance. The decision below is both flatly incompatible with this Court's First Amendment jurisprudence and squarely in conflict with the decisions of other circuits. This Court should grant review.

The County would have this whole case hinge on the irrelevant detail that petitioners described their expressive activity as "praise and worship." But the County's position makes no sense at all. First of all, as Judge Tallman stated in his dissent, "words on a flyer make no difference in the disposition of this case." App. 43a – 44a. The First Amendment rights at issue here do not turn on whether Faith Center characterized its speech as "praise and worship" according to its own theological perspective, nor would this characterization relieve the County of its independent obligation to administer its speech forum in a constitutional

manner. A private group's idiosyncratic label for its expression does not control the contours of its First Amendment libe rties. Most importantly, otherwise constitutionally protected expression – singing, reading, petitioning – cannot be expelled from a forum open to precisely such activities merely by slapping the label, "worship" upon the expression. *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995).

Second, the central (and erroneous) legal premise of the Ninth Circuit's decision was that the category of speech that qualifies as "worship" is constitutionally distinguishable from other, otherwise (in secular terms) indistinguishable speech. That this notion of worship as a separate category of speech is of dubious sensibility was explained by this Court in *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981). And the arbitrariness of such a distinction was illustrated well by the Ninth Circuit when it validated the County's bizarre determination that Hattie Hopkins could give her morning speech on "The Making of a Intercessor" because it was merely "religious speech," App. 26a-27a, but that she could not give her afternoon speech on "Positioning Yourself for Victory" because Faith Center had used the words, "praise and worship" to describe that afternoon session. App. 28a.

Third, even if there were such a thing as "pure religious worship"[1] that could be segregated from expressive religious activities, petitioners' expression would not fall into that supposed category. A sermon by Hattie Hopkins certainly qualifies for forum access. App. 5a.

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[1] The County repeatedly implies that petitioners conceded their speech to be "pure religious worship." *E.g.*, Opp. at 3, 5, 8, 9. That phrase, however, is the Ninth Circuit's, not petitioners'.

The Ninth Circuit believed that its decision was justified by this Court's use of the term, "mere religious worship" in *Good News Club*, 533 U.S. at 112 n.4. That case, of course, rejected precisely the proposition the Ninth Circuit embraced: that otherwise eligible speech may be excluded from a forum simply because it also constitutes "worship." *Id.* As in *Good News Club*, petitioners' "activities do not constitute mere religious worship, divorced from any teaching of moral values." *Id.*

As Judge Tallman stated in dissent below, "[r]egardless of what Faith Center chooses to print on its flyers, or what it chooses to call its activities, worship cannot logically be parsed from all other forms of religious expression in the way the County intends." App. 44a.

II. THE SECOND CIRCUIT'S 2003 DECISION IN *BRONX HOUSEHOLD OF FAITH* PRESENTS A CIRCUIT SPLIT WITH THE NINTH CIRCUIT DECISION BELOW THAT WAS NOT ALTERED BY THE SECOND CIRCUIT'S JULY 2, 2007 DECISION.

The Ninth Circuit's decision here is in conflict with the Second Circuit's decision in *Bronx Household of Faith v. Board of Education of the City of New York*, 331 F.3d 342 (2d Cir. 2003) ("*Bronx Household II*"). *See* Pet. at 13-16. In that case, the Second Circuit upheld a preliminary injunction against a Board of Education policy that barred religious services at the New York City public schools during nonschool hours.

The County seeks to distinguish this case from that of *Bronx Household II* by asserting that the latter case did not involve "pure religious worship," but instead entailed the combination of worship with teaching and other religious speech. Opp. at 7. But the present case likewise involves a

combination of worship with teaching and other religious speech. The brochure states:

> PRAISE & WORSHIP: 1:00PM - 3:00PM
> SPECIAL SPEAKER: DR. HATTIE HOPKINS
> SERMON: "Position Yourselves for Victory"

Declaration of Danielle R. Merida, Exhibit A, District Court Docket Entry #30. Thus, the distinction the County urges between this case and *Bronx Household II* is instead a point of similarity.

The County next seeks to distinguish this case from *Bronx Household II* by insisting that the Second Circuit had no occasion to address the question of "pure religious worship," as the facts of the case did not call for such an evaluation, but that such a question is squarely presented in this case because Faith Center "itself conceded that its activities constituted pure religious worship." Opp. at 7-8. This is an equivocation. That is, the County would have this Court conclude that because the entry "Praise and Worship" appeared on Faith Center's brochure describing its afternoon seminar session, the organization was thereby stipulating for purposes of unanticipated future litigation that its speech is to be categorized in the esoteric, nouveaux (and conceptually dubious) constitutional speech category of "pure religious worship," which is to be distinguished from other religious speech.[2] The absurdity of this premise is apparent.

The County also argues that a circuit split no longer exists because the Second Circuit's most recent decision on

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[2] The County attempts a similar attribution of significance to an isolated, four-word response of counsel at a hearing before the district court. Opp. at 5. That this is altogether incapable of carrying the weight the County would assign it requires no elaboration. Judge Tallman makes this same point in his dissent. App. 44a-45a n.2.

July 2, 2007, in *Bronx Household of Faith* v. *Board of Education of the City of New York*, __ F.3d __, 2007 WL 1880477 (2d Cir. 2007) ("*Bronx Household III*") has vacated the injunction affirmed in *Bronx Household II*. This is not only incorrect factually,[3] it misses the relevant consideration bearing on the question of a continuing circuit split. First, the recent decision did not even reach the merits. One judge voted to affirm, one voted to reverse, and one thought the case was not ripe. Hence, the recent panel had nothing to say about the vitality of the prior *Bronx Household* precedent. Second, the July 2 panel could not overrule the prior panel decision in any event, as only this Court or an en banc panel has the power to do so. *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004).

Therefore, a circuit split continues to exist between the Second Circuit's 2003 decision in *Bronx Household of Faith* and the Ninth Circuit's decision here in *Faith Center* on whether the government may exclude religious "worship" but allow religious "speech" in a forum generally open to the public for expressive activities.

III. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF SEVERAL CIRCUITS THAT HAVE FOUND DESIGNATED PUBLIC FORA WHERE EVEN MORE RESTRICTIONS WERE IN PLACE THAN ARE PRESENT IN THIS CASE.

This Court should also grant review to resolve a circuit conflict over whether a forum generally open to the public is a "designated public forum" (as several circuits have held) or a "limited forum" (as the Ninth Circuit held in this case). In a

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[3] The two judges who formed the majority result to vacate the permanent injunction stated specifically that the preliminary injunction remained in effect. *Bronx Household III*, 2007 WL 1880477 at 22 (opinion of Judge Leval); *id.* at 35 n.2 (opinion of Judge Calabresi).

"designated public forum," content-based exclusions are evaluated by the compelling state interest standard, as in *Widmar v. Vincent*. The County does not even attempt to defend its exclusion of "religious services" under that rigorous test.

The County accuses Faith Center of urging a "brand new rule of forum law," *viz.*, that a "limited forum" classification only be available when the government allows but one form of speech into a forum. Opp. at 15. While this mischaracterizes Faith Center's argument (*see* Pet. at 29), it ironically draws attention to the converse error committed by the County: the County categorically excludes only *one* form of speech, and then insists the forum be considered "limited." The County, following the Ninth Circuit, thus proposes to make the very constitutional violation it commits (the discriminatory exclusion of religious services from a forum open to the public) the basis upon which to downgrade the forum designation (from "designated" to "limited"), and thereby relieve itself of the responsibility to provide a compelling state interest for its discrimination.[4] Such an end-run analysis would ensure that the government will never be subject to the compelling state interest test for its content-based exclusion of speech from a forum it operates – a conclusion entirely incompatible with governing Supreme Court and circuit court jurisprudence.

The County downplays the fact that it allows, by policy and practice, a broad range of expression in its library meetings rooms. "It is the policy of the Contra Costa County Library to encourage the use of library meeting rooms for

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[4] For purposes of this discussion, petitioners utilize the terms "designated forum" and "limited forum" in the manner adopted by the Ninth Circuit, while acknowledging that this usage is not accepted by all circuits, and perhaps even by this Court. *See* Brief of Amicus Curiae Cato Institute Supporting Petitioners at 14-17.

educational, cultural and community activities." App. 108a-109a. The County has allowed the Democratic Party "to present issues and candidates to members," Pet. at 2, and has admitted such groups as the Sierra Club, Narcotics Anonymous, and many others. Pet. at 3.

The County has really only excluded one type of expression: "religious services." To be sure, there are regulations governing the use of the forum. For example, the Library allows community groups to meet for free unless they charge admission or solicit for funds. App. 109a. (In the latter case, the County simply charges the organization to use the library meeting rooms. *Id.*) And the Library limits schools to holding only "special meetings, programs or activities," not regular classes. *Id.* But these are not exclusions of particular *content*. Indeed, even *religious* speech is allowed so long as it is not deemed a forbidden "service." App. 26a-27a.

Such a forum would plainly qualify as a "designated public forum" in the First, Third, Fourth and Fifth Circuits. In each of the cases cited in the Petition, *see* Pet. at 23-28, circuit courts struck down exclusions of religious expression under the designated forum standard. The County tries to distinguish these cases, especially the Third Circuit's decision in *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990). In that case, the Third Circuit ruled that the governmental entities had created designated public forums despite *greater* restrictions on content than the County imposes here, and declared unconstitutional the restriction on religious worship. *Id.* at 1383.

Additionally, the Tenth Circuit, in *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), found that a forum opened for discussions and presentations "of interest to senior citizens," was a designated public forum by

policy and practice. *Id.* at 1276. "The City has permitted lectures and classes on a broad range of subjects by both members and non-members at its Senior Centers." *Id.* at 1278. The Tenth Circuit declared unconstitutional the City's policy prohibiting use of the senior centers "for sectarian instruction or as a place for religious worship." *Id.* at 1277.

In short, the decision below creates a multi-circuit split on this additional, recurring important free speech issue.

CONCLUSION

As Judge Walker said in his opinion in the July 2, 2007 decision in *Bronx Household of Faith*, "there is no doubt that this particular dispute - no stranger to the Supreme Court and now focused on worship - would benefit from a more conclusive resolution by that Court."[5] Petitioners respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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[5] *Bronx Household of Faith v. Board of Educ. of City of New York*, __ F.3d __, 2007 WL 1880477 at 35 (2d Cir. 2007).

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Petitioners,

v.

FEDERAL D. GLOVER, MARK DESAULNIER, JOHN M. GIOIA, MILLIE GREENBERG, JOHN W. SWEETEN, ANNE CAIN, PATTY CHAN, LAURA O'DONAHUE, AND GAYLE UILKEMA,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

Amicus curiae Cato Institute respectfully submits that the petition for a writ of certiorari should be granted.[1]

INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because the decision of the United States Court of Appeals for the Ninth Circuit weakens fundamental First Amendment protections for the freedom of speech.

STATEMENT

The Board of Supervisors of Contra Costa County, California ("the County"), adopted a policy

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the Cato Institute, its counsel, and its members made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief by all parties have been submitted to the Clerk.

that opened library meeting rooms to every manner of "educational, cultural and community related meetings, programs, and activities," but excluded "religious services." Pet. App. 3a, 108a–09a. After completing the requisite applications, Dr. Hattie Hopkins, the leader of Faith Center Church Evangelistic Ministries ("Faith Center"), received permission to hold meetings in the meeting room of the Antioch Branch Library on both May 29 and July 31, 2004. *Id.* 4a. These meetings were to include "discussing the Bible and other religious books," as well as "teaching, praying, singing, . . . and discussing social and political issues." *Id.* 4a; *see also id.* 5a (noting that the May 29 worship service included a sermon). Toward the end of the May 29 service, library officials revoked permission for Faith Center's July 31 meeting based solely on the County's policy prohibiting use of the meeting rooms for "religious purposes." *Id.* 5a & n.1; *see also id.* 71a–72a, 92a.[2]

Faith Center sought a preliminary injunction enjoining enforcement of the County's policy singling out "religious services" for exclusion. Pet. App. 66a–67a. The district court granted the injunction, concluding that Faith Center had demonstrated that the County's policy constituted "discrimination against [Faith Center's] speech based on its viewpoint," in violation of the First Amendment. *Id.* 76a.

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[2] The actual language of the County's restriction has changed multiple times since Faith Center was denied access to the meeting room for its worship services. *Id.* 3a. Its initial prohibition on using the rooms for "religious purposes" was amended to bar "religious services or activities" and then revised again to its current form of prohibiting "religious services."

A divided panel of the Ninth Circuit reversed. The panel majority reasoned that the County's policy did not discriminate based on viewpoint because it excluded only "mere religious worship." Pet. App. 25a (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001)), 26a. Although the County's "broad purpose" in opening the library meeting rooms to the public "was to invite the community at large to participate in use of the meeting room for expressive activity," the panel majority concluded that the exclusion of religious services "ma[d]e clear that the County did not intend for the Antioch Library meeting room to be open for indiscriminate use." *Id.* 15a–17a. Finding that the meeting room was a limited public forum, the majority concluded that the policy of excluding "religious services" was a reasonable measure to ensure that the meeting room was "not transformed into an occasional house of worship," *id.* 19a—this despite the panel's acknowledgment that "[r]eligious worship and discussion are forms of speech and association protected by the First Amendment." *Id.* 11a (citing, *inter alia*, *Widmar v. Vincent*, 454 U.S. 263, 269 (1981)). The majority also concluded that it was reasonable for the County to exclude religious services in order to prevent "controversy and distraction" that could "potentially interfere with the primary function of the library." *Id.* 20a.

In dissent, Judge Tallman, noting that "[b]oth parties agree that religious activities, including worship, are speech protected by the First Amendment," criticized the majority for failing even to "attempt to answer the insoluble riddle of how the County could parse religious speech which conveys a viewpoint on an otherwise permissible topic with *mere* religious

worship that is impermissible speech according to the court." Pet. App. 42a, 47a.

The Ninth Circuit denied rehearing. Pet. App. 87a. Dissenting from the denial of rehearing en banc, Judge Bybee, joined by six other judges, castigated the panel opinion for "permit[ting] the government to single out what it calls 'mere religious worship' for exclusion from a forum that it has opened broadly for use by community and cultural groups." *Id.* 88a. "[T]he [panel] majority," he continued, "has disregarded equal-access cases stretching back nearly three decades, turned a blind eye to blatant viewpoint discrimination, and endorsed disparate treatment of different religious groups." *Id.* 88a–89a.

REASONS FOR GRANTING THE PETITION

This Court has made clear that the First Amendment limits the restrictions the government may impose on protected speech, regardless of the type of forum in which it is uttered. Any restriction of protected speech "must not discriminate against speech on the basis of viewpoint, and . . . must be reasonable in light of the purpose served by the forum." *Good News Club*, 533 U.S. at 106–07 (citations and internal quotation marks omitted).

Holding that the decision to exclude Faith Center's "worship services" was "not suppression of a prohibited perspective on an otherwise permissible topic," Pet. App. 22a, and was otherwise "reasonable, in light of the library policy," *id.* 19a, the Ninth Circuit's opinion stands in clear contravention of this Court's precedents on both viewpoint discrimination and reasonable restrictions on protected speech. The Ninth Circuit's casual disregard of this Court's decisions allows the government to silence religious

speech whenever the speaker engages in undefined "religious worship" on public property located anywhere in the largest circuit in the Nation. In addition to being squarely at odds with this Court's precedents, the decision below provides an opportunity for this Court to bring clarity to the diverging standards adopted by the Courts of Appeals to govern the protection of free speech occurring on government property. The petition for a writ of certiorari should be granted.

I. SINGLING OUT "RELIGIOUS WORSHIP" FOR EXCLUSION IS VIEWPOINT DISCRIMINATION

"When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is . . . blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)). This Court has stated that "[v]iewpoint discrimination is thus an egregious form of content discrimination," which itself is "presumed to be unconstitutional." *Id.* at 828–29. The government therefore always must "abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 828. The County's proscription of "religious services" and "religious worship" is a paradigmatic example of viewpoint discrimination. The Ninth Circuit's contrary conclusion conflicts with three of this Court's decisions.

The governmental policy this Court considered and overturned in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), was materially identical to the County's policy prohibiting Faith Center's worship service. In that case, public school property was opened for "social, civic

and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," *id.* at 386, but the school board expressly prohibited using the premises "for religious purposes," *id.* at 387. Under the policy, the school district denied the applications of an evangelical church that sought access to the property to show films described as promoting a "return[] to traditional, Christian family values." *Id.* at 388. This Court held that disallowing a religious viewpoint on the subject of family issues and child rearing—subject matters which fit within the purposes of the forum created by the public school—violated the First Amendment. *Id.* at 393–94.

Here, the County encouraged use of the public library for community-related activities, Pet. App. 2a–3a, and Faith Center's applications to use the library space fell well within that stated purpose: Faith Center stated that its meetings were designed for "Worship Open to the Public" and to "Build up Community." *Id.* 4a. The Ninth Circuit recognized that "religious worship is an important institution in any community," but then made the conclusory statement that this "important [community] institution" was only "remotely community related." *Id.* 29a. Prohibiting Faith Center from engaging in speech that focused on community building solely because that speech took the form of a religious worship service conflicts with *Lamb's Chapel*.

This Court's subsequent jurisprudence has made clear that whatever type of forum exists, the government cannot exclude speech from a religious viewpoint that addresses a subject matter within the scope of the forum, regardless of whether the speech takes the form of "worship." In *Rosenberger*, for ex-

ample, this Court held that the exclusion of a religious-based publication from the University of Virginia's otherwise broadly open forum (a student activities fund) constituted impermissible viewpoint discrimination. 515 U.S. at 830, 832. The University's guidelines prohibited "religious activity," which it defined as "any activity that 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'" *Id.* at 825. Although this religious speech included proselytization, a religious activity that the dissent thought lacked a secular equivalent, *id.* at 867–68 (Souter, J., dissenting), the Court concluded that the speech must be treated no differently from speech that offered a religious viewpoint on an otherwise permissible topic: because the University did not "exclude religion as a subject matter," it could not bar "those student journalistic efforts with religious editorial viewpoints." *Id.* at 831; *see also* Pet. App. 97a–98a.

Despite the similarities between the "religious activities" proscribed by the University in *Rosenberger* and the "religious services" prohibited by the County, the Ninth Circuit here took the opposite tack of that charted in *Rosenberger*: it concluded that because "[p]ure religious worship . . . is not a secular activity that conveys a religious viewpoint on otherwise permissible subject matter," this one type of religious speech falls outside the bounds of the Free Speech Clause. Pet. App. 28a–29a. As *Rosenberger* demonstrates, however, it is not the lack of a secular equivalent to worship that matters, but the fact that the County excludes religious speech in the context of a religious service simply because of its viewpoint. "Religion," this Court explained, is "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered."

Rosenberger, 515 U.S. at 831. Sermons, the Ninth Circuit acknowledges, are part of Faith Center's worship services, Pet. App. 4a, and those sermons express religious perspectives on topics, such as the discussion of religious texts and of social issues, that are "clearly permissible in the library" forum. *Id.* 28a. The Ninth Circuit's decision permitting the County to exclude "religious services" that express religious views on any number of issues, including religious activities (such as worship) and secular activities (such as discussing social issues), conflicts with this Court's teaching in *Rosenberger*.

This Court's opinion in *Good News Club* also mandates the same conclusion. The forum at issue in *Good News Club* was "available for 'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community.'" 533 U.S. at 102. This policy had been specifically interpreted to include "teaching morals and character development to children." *Id.* at 108. Good News Club's activities consisted of, among other things, singing songs and hearing Bible lessons, and the Court found that "it [was] clear that the Club teaches morals and character development to children." *Id.* at 103, 108. Because "the Club [sought] to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious viewpoint," *id.* at 109, this Court held that "the exclusion of the Good News Club's activities . . . constitute[d] unconstitutional viewpoint discrimination," *id.* at 110.

Here, discussion of religion itself *is* a permissible subject matter: indeed, the Ninth Circuit expressly recognized that it is "permissible in the Antioch meeting room" to "discuss[] the Bible and other reli-

gious books" because such discussion "convey[s] a religious perspective" on a permissible topic. *Id.* 27a; *see also id.* 28a–29a. Atheists, for example, could meet to discuss their views on religion without running afoul of the policy prohibiting speakers from conducting a "religious service" or without contravening the Ninth Circuit's prohibition on engaging in "religious worship." It is, in other words, only a particular viewpoint—here, a religious one—that is excluded. To paraphrase *Good News Club*, the "exclusion of [Faith Center] based on its religious nature is indistinguishable from the exclusions in [*Lamb's Chapel* and *Rosenberger*]" and "constitutes viewpoint discrimination." *Id.* at 107.

In spite of these consistent precedents, the Ninth Circuit interpreted a footnote in *Good News Club* as "implicitly acknowledg[ing] that religious worship exceed[s] the boundaries of the limited public forum" and as distinguishing "'mere religious worship'" from the activities of the Good News Club to teach moral lessons. Pet. App. 29a; *see also id.* 25a–26a (citing *Good News Club*, 533 U.S. at 138 n.3 (Souter, J., dissenting)). But this Court contrasted the activities of the Good News Club (which explicitly sought to teach morals and character development to children) with "mere religious worship" (which did not aspire to such aims) simply to show that the Club's activities in fact related to a subject matter that fell within the forum's purposes. *See Good News Club*, 533 U.S. at 112 n.4 ("In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values."). The Court had no occasion to address whether speech that did not relate to "teaching of morals and character development to children" fell within other permissible topics of discussion, such as those that

would be discussed at "social, civic, and entertainment meetings" or other topics "pertaining to the welfare of the community." *Id.* at 102, 108.

Because of its heavy reliance on (and misreading of) *Good News Club*'s passing footnote reference to "mere religious worship," the Ninth Circuit reached a strange conclusion: while recognizing that excluding religious speech is viewpoint discrimination, Pet. App. 27a, it concluded that prohibiting a subset of religious speech (*i.e.*, religious worship) is somehow not viewpoint discrimination. Because this decision conflicts with multiple precedents of this Court, review is warranted.

II. AS A SUBJECT-MATTER LIMITATION, THE EXCLUSION OF RELIGIOUS SERVICES IS NOT REASONABLY RELATED TO THE FORUM'S PURPOSES

Even if the County's proscription of religious worship were not viewpoint discrimination—that is, even if it were construed as a limitation on *subject matter*—it still would conflict intractably with this Court's decisions. Any restriction on the content of speech allowed in any type of forum "must be 'reasonable in light of the purpose served by the forum.'" *Good News Club*, 533 U.S. at 107 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). In holding that the County's exclusion of religious worship services met this test, Pet. App. 15a, the Ninth Circuit offered two related justifications for the County's exclusion of religious services: first, because but for the exclusion of religious worship services, the Antioch library could be "transformed into an occasional house of worship," *id.* 19a; and second, because religious uses could "interfere with the primary function of the library" by creating

"controversy and distraction" that "may alienate patrons," *id.* 20a–21a. This Court, however, has squarely rejected each of these justifications.

With respect to the first justification, the Ninth Circuit reasoned that the County's decision to exclude religious services must be deemed reasonable because to conclude otherwise "would result in the 'remarkable proposition that any public [building] opened for civic meetings must be opened for use as a church, synagogue, or mosque." Pet. App. 20a (quoting *Good News Club*, 533 U.S. at 139 (Souter, J., dissenting)). As an initial matter, this rationale seems only to restate the exclusion, failing to justify it. The goal of preventing the library from being used for religious worship while allowing its use for a wide range of other purposes cannot itself constitute the rationale for closing the library to religious worship.

Moreover, this justification is not reasonably related to the purpose served by the forum. As the Ninth Circuit acknowledged, "the County's purpose [in creating the forum] was to invite the community at large to participate in the use of the meeting room for expressive activity." Pet. App. 15a. Preventing occasional worship services from occurring in the meeting rooms is not related to and does not advance that purpose; to the contrary, such services are a type of community activity encouraged by the policy, and they include discussion topics well within the forum's scope.

More importantly, this Court rejected exactly this rationale in *Widmar*: "[T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this

case by the Free Speech Clause as well." 454 U.S. at 276. When a public building is opened broadly for purposes that include religious subject matters, the First Amendment's Free Speech Clause requires that the building be available for religious worship. The government may impose reasonable time, place, and manner restrictions, applicable to all groups, to ensure that the space does not become a permanent house of worship. *See id.* Or the government may choose to close the forum. The government may not, however, exclude religious services from a forum simply because of the "religious" content of the speech. Such exclusion is not reasonably related to any *legitimate* government interest. *See, e.g.*, *Rosenberger*, 515 U.S. at 829–30.

The second justification relied on by the Ninth Circuit is equally without merit. Even assuming that the County's interest in protecting the character of the library is reasonable, permitting religious worship services is simply not inconsistent with maintaining the library's "primary function as a sanctuary for reading, writing, and quiet contemplation." Pet. App. 20a. There have been no assertions in this case that the worship service was disruptive—quite the contrary, the County admits that noise from the meeting was not an issue, *id.* 5a n.1—nor is there any assertion that Faith Center's meetings posed any greater risk of disruption to the patrons of the library than any other meeting conducted there. But even if such claims had been made, the proper restriction would be on the time, place, and manner of the speech, not the content of that speech.

Moreover, the Ninth Circuit's fear that "the controversy and distraction of" religious worship services "may alienate patrons and undermine the li-

brary's purpose of making itself available to the whole community," Pet. App. 20a–21a, is the same argument this Court rejected in *Lamb's Chapel*. In *Lamb's Chapel*, the school district contended that it "justifiably denied use of its property to a 'radical' church for the purpose of proselytizing, since to do so would lead to threats of public unrest and even violence." 508 U.S. at 395. Just as in *Lamb's Chapel*, "[t]here is nothing in the record to support such a justification[.]" *Id.* at 396. The County has already opened the room to controversial groups that have the potential to alienate patrons—the Sierra Club, Narcotics Anonymous, and the East Contra Costa County Democratic Club, Pet. App. 15a–16a—and there is no reasonable basis to believe that religious worship services would be any more controversial than these potentially divisive organizations. In any event, this Court has recognized that even if the religious services were found to be controversial, concerns about controversy "would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject [that is] otherwise open[] to discussion on [government] property." *Lamb's Chapel*, 508 U.S. at 396; *cf. Reno v. ACLU*, 521 U.S. 844, 880 (1997) (striking down statute that would give "heckler's veto" to individuals opposed to controversial expression).

In short, prohibiting religious worship from a forum established "for educational, cultural and community related meetings, programs, and activities" lacks any reasonable basis. *Cf. Good News Club*, 53 U.S. at 122 (Scalia, J., concurring) ("Lacking *any* legitimate reason for excluding the Club's speech from its forum—'because it's religious' will not do—respondent would seem to fail First Amendment scrutiny regardless of how its action is character-

ized.") (citations omitted). Thus excluding religious services in light of the forum's purpose and the County's policy cannot be reconciled with this Court's precedents.

III. WIDESPREAD CONFUSION AMONG THE COURTS OF APPEALS CALLS FOR THIS COURT TO CLARIFY THE PUBLIC-FORUM DOCTRINE

This Court discussed the public-forum doctrine as an integral part of its analysis in each of the key precedents discussed above. *See, e.g.*, *Good News Club*, 533 U.S. at 106; *Rosenberger*, 515 U.S. at 829–30; *Lamb's Chapel*, 508 U.S. at 391–94; *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) (describing *Lamb's Chapel* and *Rosenberger* as "limited forum cases"); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 n.12 (2000) (same). While it is true that the standards addressed above apply even in a nonpublic forum, *see Cornelius*, 473 U.S. at 819 (requiring that distinctions between speakers in nonpublic forums be "reasonable and viewpoint-neutral"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (same), the Court should take this opportunity to supply some badly needed guidance to the Courts of Appeals that are, by their own admission, quite confused as to how the doctrine applies to property that is neither a traditional public forum nor a nonpublic forum. *See, e.g.*, *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006) ("Substantial confusion exists regarding what distinction, if any, exists between a 'designated public forum' and a 'limited public forum.'").

Nearly a quarter century has passed since this Court introduced a three-tier public-forum doctrine to govern First Amendment analysis in cases involving government property. *See Perry Educ. Ass'n*, 460

U.S. at 45–46; *see also Cornelius*, 473 U.S. at 799–806. Despite frequent references to the doctrine by this Court, the Courts of Appeals continue to be at odds over even the most basic and essential components of the doctrine. Far from providing necessary guidance, this Court's more recent but seemingly inconsistent references to the doctrine have spurred on continued conflicts among the circuits over the terminology, categories, and standards of review governing speech in public forums. *See, e.g.*, *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 345 n.10 (5th Cir. 2001) (explaining that "[a]t times, the Supreme Court has referred to limited public forums as being a subcategory within a designated public forum," that "[i]n more recent cases, however, the Court has used the phrase 'limited public forum' to describe a type of nonpublic forum of limited access," and that even more recently "the Supreme Court once again used the phrase limited public forum to designate the intermediate forum category, as opposed to a nonpublic forum").

The circuit courts diverge, for example, as to whether the public-forum doctrine's middle tier consists of one category or two. *Compare, e.g.*, *Hosty v. Carter*, 412 F.3d 731, 737 (7th Cir. 2005) (en banc) (Easterbrook, J.) (one tier); *Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 802–03 (11th Cir. 2004) (one tier), *with, e.g.*, *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007) (two tiers); *see also Gilles v. Blanchard*, 477 F.3d 466, 473–74 (7th Cir. 2007) (Posner, J.) (asserting that it is circuit courts that have "carved out a fourth category"). Of those circuits in the one-category camp, some conclude that the limited public forum and the designated public forum are interchangeable, while others conclude that it is the limited public forum and the nonpublic forum that are

synonymous. *Compare ACLU v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005) (referring to "limited (or designated) public forums"); *Kincaid v. Gibson*, 236 F.3d 342, 348 (6th Cir. 2001) (en banc) (noting that the Supreme Court has "alternatively described" the middle category as a "limited public forum" and as a "designated public forum"); *PETA, Inc. v. Gittens*, 414 F.3d 23, 28–30 (D.C. Cir. 2005) (using "designated public forum" and "limited public forum" interchangeably), *with Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76 & n.4 (1st Cir. 2004) (equating "limited public forum" with "non-public forum"). Of the circuits that employ two intermediate tiers, some have concluded that the limited public forum is a subset of the designated public forum, while others identify it as a subset of the nonpublic forum. *Compare Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 625–26 (2d Cir. 2005) ("[f]ollowing the lead of the Supreme Court" in "classify[ing] fora for expression in four categories" including the "'designated public forum,' and its subset, the 'limited public forum'"); *Justice For All v. Faulkner*, 410 F.3d 760, 765 (5th Cir. 2005) ("[T]he Supreme Court has made it clear that this middle category is further divided into two discrete types of forum: true 'designated' forums and 'limited' forums."); *Bowman*, 444 F.3d at 976 (8th Cir. 2006), *with Summum v. City of Ogden*, 297 F.3d 995, 1002 n.4 (10th Cir. 2002) ("A 'limited public forum' is a subset of the nonpublic forum classification.").

Indeed, the most definite and perhaps only area of broad agreement among the circuits as to the intermediate tier (or tiers) of the public-forum doctrine is that there is "[s]ubstantial confusion," "uncertainty," and "analytical ambiguity" as to its application. *See, e.g.*, *Bowman*, 444 F.3d at 975 (8th Cir.);

Whiteland Woods, L.P. v. Twp. of W. Whiteland, 193 F.3d 177, 182 n.2 (3d Cir. 1999); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004); *see also Ridley*, 390 F.3d at 76 n.4 (1st Cir.); *Goulart v. Meadows*, 345 F.3d 239, 249 (4th Cir. 2003); *Chiu*, 260 F.3d at 345–46 (5th Cir.); *Christian Legal Society v. Walker*, 453 F.3d 853, 865 n.2 (7th Cir. 2006); *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001).

These differences are important—in fact, given this Court's instruction that the applicable standards "depend upon the nature of the forum," *Good News Club*, 533 U.S. at 106, they are often outcome determinative. *See also United States v. Kokinda*, 497 U.S. 720, 726 (1990) ("'[T]he extent to which the Government can control access depends on the nature of the relevant forum." (quoting *Cornelius*, 473 U.S. at 800)). As illustrated by the case at hand, the Courts of Appeals need guidance on this important analytic framework governing a wide swath of constitutionally protected speech.

* * *

Unless this Court reverses the panel decision, any speech classified as religious worship will now be placed outside the protection of the Free Speech Clause in the largest circuit in the Nation, except where such worship occurs in a traditional public forum. As parks, sidewalks, streets, and the curtilages of state capitols are, for obvious reasons, hardly conducive to typical types of worship activities, the practical effect of the Ninth Circuit decision will be to silence a significant amount of religious speech that this Court has recognized as constitutionally protected. This conflict with prominent decisions of this Court, however, is highly unlikely to be resolved in

the Ninth Circuit in the near future, as demonstrated by its failure to rehear the case en banc, despite the dissent of seven judges. Given the fact that this Court's precedents directly control the outcome, there is no need for further percolation in the circuit courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Supreme Court of the United States

FAITH CENTER CHURCH EVANGELISTIC MINISTRIES AND HATTIE HOPKINS,

Petitioners,

v.

FEDERAL D. GLOVER, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE CHRISTIAN LEGAL SOCIETY, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE NATIONAL ASSOCIATION OF EVANGELICALS, AND THE COALITION FOR EQUAL ACCESS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

The Christian Legal Society (the Society) is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous accredited law schools. The Society's legal advocacy and information division, the Center for Law & Religious Freedom (the Center), works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation. The Center strives to preserve religious freedom in order that men and women might be free to do God's will and because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with neither rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

The Ethics & Religious Liberty Commission (ERLC) is an agency of the Southern Baptist Convention (SBC) that is dedicated to addressing social and moral concerns and their implications on public policy issues from City Hall to Congress. The SBC is the largest Protestant denomination in the country, with over 16 million members. ERLC's mission is to

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[*] The parties consented to the filing of this brief, and copies of the consent letters are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

awaken, inform, energize, equip, and mobilize Christians to be the catalysts for the Biblically-based transformation of their families, churches, communities, and the nation. Hundreds of Southern Baptist churches have used or are currently using public facilities as integral parts of their religious activities. Many hundreds more will need to meet in public facilities in the future in order to meet their spiritual obligations to God, their members, and their communities.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and ministries in the United States. It serves 60 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and ministries. NAE believes that religious freedom is a gift of God and vital to the limited government which is our American constitutional republic.

The Coalition for Equal Access ("CEA") is an association of fifteen religious organizations which use public facilities for religious services. While a number of CEA members are located within the Ninth Circuit, members hail from locations from across the country, from Boston to Shreveport to San Juan Capistrano. For CEA members, public meeting spaces often provide the only available location for religious services. The CEA members include small congregations that otherwise do not have the resources to meet elsewhere. For example, CEA member South Riding Church holds weekly worship services at a public school in Virginia because it is

the only location with enough space that the church can afford to rent for one-half day per week. Member St. Bernard Baptist Church of Louisiana began meeting in a public high school after their small church building was damaged by Hurricane Katrina. Lighthouse Christian Fellowship meets in a public elementary school in California on a weekly basis. As approximately 19 other churches in the area also use public schools, the loss of such space would result in all these churches competing for private rentals in the same area, with some churches forced to shut down permanently. CEA believes equal access to public meeting spaces for worship and religious gatherings is critical to the exercise of religion.

ARGUMENT

Amici join Petitioners, the Faith Center Church and Hattie Hopkins, in urging this Court to grant their petition for a writ of certiorari. While *Amici* concur with the argument stated in the petition, *Amici* raise additional reasons why the petition should be granted.

As copious case law and a drive around practically any community on a weekend attests, religious organizations across this country frequently use public spaces for their services and other meetings. This case presents but one example and raises these important issues:

1. Is a law that expressly prohibits religious services in a public space consistent with the First Amendment's

proscription of any law prohibiting the free exercise of religion?

2. Is a religious worship service protected speech under the First Amendment?

3. At a minimum, can a government distinguish between religious "services" and "speech" without becoming unconstitutionally entangled?

This Court should grant the petition because the Ninth Circuit's majority opinion misreads the First Amendment and threatens the vibrant exercise of religion as practiced extensively throughout this country, generally by smaller, less affluent congregations.

I. Certiorari Should Be Granted Because Use of Public Spaces for Religious Services Is Widespread

The majority opinion of the Court of Appeals gives state and local governments the ability to prevent a religious organization from conducting a "religious service" in a space generally made available for other community organizations for "educational, cultural and community related meetings, programs, and activities." *Faith Ctr. Church Evangelical Ministries v. Glover*, 462 F.3d 1194, 1198, 1214 (9th Cir. 2006). This is inconsistent with historical practice and threatens present practice that is common throughout the land.

The following historical sampling is taken from the Library of Congress Online Exhibition:

Religion and the Founding of the American Republic, http://www.loc.gov/exhibits/religion/rel06-2.html (last visited July 16, 2007):

> *Within a year of his inauguration, Jefferson began attending church services in the House of Representatives. Madison followed Jefferson's example, although unlike Jefferson, who rode on horseback to church in the Capitol, Madison came in a coach and four. Worship services in the House—a practice that continued until after the Civil War—were acceptable to Jefferson because they were nondiscriminatory and voluntary.*
>
> * * *
>
> *The first Treasury Building, where several denominations conducted church services, was burned by the British in 1814.*
>
> * * *
>
> *The House moved to its current location on the south side of the Capitol in 1857. It contained the "largest Protestant Sabbath audience" in the United States when the First Congregational Church of Washington held services there from 1865 to 1868.*

On the other end of the social spectrum, African-American congregants in the North in pre-Civil War times were ostracized by white congregations. Because they often could not afford their own church buildings, they resorted to public buildings for religious services. *See* CRAIG D.

TOWNSEND, FAITH IN THEIR OWN COLOR: BLACK EPISCOPALIANS IN ANTEBELLUM NEW YORK CITY ch. 5 (2005).

The need of smaller, less affluent congregations to use public facilities is still present today. While most publicity goes to the "mega-churches," the average size of a Christian congregation in the United States is less than 100, and many smaller congregations cannot afford to own their own property. U.S. Congregational Life Survey, *available at* http://www.uscongregations.org/challenges.htm (last visited July 16, 2007). Thus, they frequently use public properties, for free or by rental, to conduct their meetings and services.

The statistics regarding American religious practice demonstrate the evident need for access to such public spaces. Forty-seven percent of American adults report that they attend regular religious services on a typical weekend. The Barna Group (2005), *available at* http://www.barna.org. Yet, 50% of all U.S. congregations contain only 11% of the total number of worshipers in a given week. U.S. Congregational Life Survey (April 2001), *available at* http://www.uscongregations.org/challenges.htm (last visited July 16, 2007). Moreover, participation in small groups for the purpose of weekday prayer, Bible study, or spiritual fellowship, excluding Sunday school or other church classes, has doubled from 11% in 1994 to 22% in 2006. The Barna Group (2006), *available at* http://www.barna.org (last visited July 16, 2007). Thus, while almost half of all Americans attend church in a given week, half of those participants belong to small congregations, and many participate in small weekday religious

groups. Such small congregations and religious groups inevitably have fewer resources available to them. Flexible, affordable, or temporary access to public places may be the only option for such organizations to gather and practice their respective faiths.

To understand the importance of public spaces for religious groups, this Court need look no farther than nearby Montgomery County, Maryland. Pursuant to a recent information request, the county provided a list of all religious organizations using county public facilities in fiscal year 2007 to date (*see* Appendix). In this one county, in less than one year, over 230 different religious groups have utilized public space. These groups form a collage of the religious spectrum, from Amazing Grace AME Zion Church to the Islamic Weekend School to Jehovah's Witnesses Spanish Congregation to Kehila Chadasha to Mother Seton Parish to St. Luke Serbian Orthodox Church to Washingon DC Buddhists' Association to Temple Shalom.

That religious organizations frequently use public facilities is reflected in this Court's own case law. *E.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (religious club to host Bible lessons and singing at public school); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (church to show religious-oriented film series at public school); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990) (religious student group to use public school facilities for prayer and Bible discussion); *Widmar v. Vincent*, 454 U.S. 263 (1981) (religious student group to use state university facilities for worship and religious

discussion). It is also amply demonstrated by congressional findings and enactments.

For instance, the legislative history of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") reflects religious organizations' widespread need for access to facilities, such as in the following excerpt: "In a *significant number of communities*, land use regulation makes it difficult or impossible to build, buy or *rent space* for a new house of worship, whether large or small." CONG. REC. S7777 (daily ed. July 29, 2000) (Melissa Rogers, then-General Counsel, Baptist Jt. Comm. on Pub. Affairs (July 14, 2000)) (emphasis added). RLUIPA was enacted because "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. *The right to* build, buy, or *rent such a space is an indispensable adjunct of the core First Amendment right to assemble* for religious purposes." CONG. REC. S7774 (daily ed. July 27, 2000) (Jt. Stmt. of Sens. Hatch and Kennedy on RLUIPA, Ex. 1) (emphasis added). Congress found RLUIPA necessary in part because congregations have difficulty building their own facilities: "zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways." *Id.*

Case law from across the country reinforces both that the use of public space by religious

organizations has been widespread for many years[1]

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[1] *See generally* C.T. Foster, *Use of Public School Premises for Religious Purposes During Nonschool Time*, 79 A.L.R.2d 1148 (2007) (collecting cases); *see, e.g.*, *DeBoer v. Village of Oak Park*, 267 F.3d 558 (7th Cir. 2001) (use of town hall for National Day of Prayer event); *Culbertson v. Oakridge Sch. Dist. No. 76*, 258 F.3d 1061 (9th Cir. 2001) (religious group to hold Bible classes at public school); *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir. 1994) (church group renting public school for worship and Bible study); *Good News/Good Sports Club v. Sch. Dist. of Ladue*, 28 F.3d 1501 (8th Cir. 1994); *Grace Bible Fellowship v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45 (1st Cir. 1991) (church to rent space at public school for Christmas dinner with prayer and religious teaching); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3d Cir. 1990) (religious group to rent public school auditorium for performance by gospel preacher); *Concerned Women for Am. v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989) (women's prayer group to use public library for prayer meeting); *Salinas v. Sch. Dist. of Kan. City*, 751 F.2d 288 (8th Cir. 1984) (religious group to hold educational film series at public school); *Liberty Christian Ctr., Inc. v. Bd. of Educ. of Watertown*, 8 F. Supp. 2d 176 (N.D.N.Y. 1998) (religious group to hold worship services in public school cafeteria); *Saratoga Bible Training Inst., Inc. v. Schuylerville Cent. Sch. Dist.*, 18 F. Supp. 2d 178 (N.D.N.Y. 1998) (religious group to hold Bible lecture in school auditorium); *Full Gospel Tabernacle v. Cmty. Sch. Dist. 27*, 979 F. Supp. 214 (S.D.N.Y. 1997) (church to hold Sunday worship at public school); *Quappe v. Endry*, 772 F. Supp. 1004 (S.D. Ohio 1991) (Bible study club to use space at public school); *Wallace v. Washoe County Sch. Dist.*, 818 F. Supp. 1346 (D. Nev. 1991) (church to hold Sunday worship services at public school); *Ford v. Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985) (religious education council to rent space at public school); *Country Hills Christian Church v. Unified Sch. Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983) (religious group to hold worship services at public school); *Hunt v. Bd. of Educ. of Kanawha County*, 321 F. Supp. 1263 (S.D. W. Va. 1971) (religious student group to hold prayer meetings at public school); *O'Hara v. Sch. Bd. of Sarasota County*, 432 So.2d 1356 (Fla. Dist. Ct. App. 2d Dist. 1983) (church to hold religious services at public school); *Resnick v. E. Brunswick*

and that this Court should resolve this important issue. Most recently, in a decision that left a panel of the Second Circuit split three ways and without a majority holding on whether New York City's school system can prohibit worship services in its schools that it rents out to other groups for meetings, Senior Judge Walker commented that "there is no doubt that this particular dispute – no stranger to the Supreme Court and now focused on worship – would benefit from a more conclusive resolution by that Court." *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, No. 06-0725-CV, 2007 WL 1880477, at *35 (2d Cir. July 2, 2007) (Walker, S.J., dissenting).

In short, both history and case law reflect the widespread use of public property for religious uses. That practice continues today, as reflected by the experience of the congregations in the *Amicus* Coalition for Equal Access. The issues presented by this case touch citizens across the country. The Ninth Circuit's decision threatens to impose a substantial burden on religious congregations, particularly on the small and the poor.

Twnshp. Bd. of Educ., 77 N.J. 88, 389 A.2d 944 (1978) (religious group to hold services at public school); *Keegan v. Univ. of Del.*, 349 A.2d 14 (Del. 1975) (religious group to hold services in state university dorms); *Pratt v. Ariz. Bd. of Regents*, 110 Ariz. 466, 520 P.2d 514 (1974) (religious group to hold services in state university stadium); *McKnight v. Bd. of Pub. Educ.*, 365 Pa. 422, 76 A.2d 207 (1950) (religious group to hold services at public school); *Greisinger v. Grand Rapids Bd. of Educ.*, 88 Ohio App. 364, 100 N.E.2d 294 (6th Dist. Wood County 1949) (religious group to hold religious themed lectures at public school).

II. Certiorari Should Be Granted Because the County's Policy Singling Out Religious Practice Violates the Free Exercise Clause

At the most elementary level, the county's policy violates the proscription of the First Amendment (made applicable to the States through the Fourteenth) that a government "make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. 1. Religious services are the purest exercise of religion.[2] As this Court observed in *Smith*, the "exercise of religion" includes such actions as "assembling with others for a worship service, participating in sacramental use of bread and wine, [and] proselytizing" – the very actions the county has prohibited here. *Employment Div., Dep't Human Res. of Or. v. Smith*, 494 U.S. 872, 877-88 (1990).

The County's policy is not one that feigns neutrality on its face, hiding its real purpose to restrict religious exercise. The County's policy openly and notoriously singles out "religious services" for exclusion from the public meeting room that is otherwise available for education, community, and cultural functions. It is hard to imagine a starker example of a law prohibiting the free exercise of religion, because that is exactly and expressly what it does.

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[2] While not addressed in the opinions below, Petitioners raised the violation of the Free Exercise Clause in the second count of their Complaint. (App. to Pet. Cert. 67a n.1; Am. Ver. Compl. ¶¶ 86-114.)

In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), this Court considered a local ordinance that, on its face, only prohibited cruelty to animals, but was designed to prohibit a small sect's religious practice. This Court looked behind the face of the ordinance to find it an unconstitutional infringement of the free exercise of religion. *Id.* at 534, 545-46. If the ordinance in *Lukumi* needed redress by this Court, how much more so does this county policy. It is express, and it targets the full panoply of religious services, not just those of a minority sect. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue . . . prohibits conduct because it is undertaken for religious reasons." *Id.* at 532. Like in *Lukumi*, the Court must intervene to protect small congregations whose free exercise rights would otherwise be abridged. *See also Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002) (unconstitutional to enforce ordinance banning posting on power poles only against lechis posted by Orthodox Jews); *Fraternal Order of Police Newark Lodge No. 12 v. Newark*, 170 F.3d 359 (3rd Cir. 1999) (unconstitutional to except from regulation banning police from having beards for medical but not for religious reasons); *Peter v. Wedl*, 155 F.3d 922 (7th Cir. 1998) (law prohibiting government-funded special education services at only religious schools was unconstitutional); *Hartman v. Stone*, 68 F.3d 973 (6th Cir. 1995) (restrictions on government funding for religious child care providers but not other providers was unconstitutional).

The open discrimination toward religious worship reflected in the county's policy is expressly

forbidden by the Free Exercise Clause. By adding its imprimatur, the Ninth Circuit sets a dangerous precedent that threatens to impede religion practice throughout this country, especially among small and poor congregations.

III. Certiorari Should Be Granted Because the County's Policy Violates the Free Speech Clause

This case, as Senior District Judge Karlton writing in concurrence below dramatized, presents a vivid contrast of visions of the First Amendment. Judge Karlton, bemoaning the "sorry state of the law" as set out by this Court (while professing to be a good soldier in applying this Court's decisions "no matter how misguided"), suggests that the Justices should "leave their chambers, go out in the street and ask the first person they meet" to help them distinguish "a sermon from a speech" and a worship service from other types of meetings. *Faith Ctr. Church*, 462 F.3d at 1215-16 (Karlton, S. J., concurring).

This just does not wash. Religious services, from the sermon to singing to prayer, are chock full of speech. This is not surprising, as religious services are communal and involve communication. The only thing that materially distinguishes religious services from other types of meetings is that the speech is predominantly religious in nature. But it is still speech.

In fact, the Scriptures of the three major religions in this country, Christianity, Judaism, and

Islam, all enjoin their adherents to *speak* to each other and to a Divine Being in worship services:

> *They devoted themselves to the apostles' teaching and to the fellowship, to the breaking of bread and to prayer.* Acts 2:42 (New Int'l Version).

* * *

> *Raise a shout for the Lord, all the earth; worship the Lord in gladness; come into His presence with shouts of joy. . . . Enter His gates with praise, His courts with acclamation. Praise Him! Bless His name! . . . Sing to the Lord a new song, His praises in the congregation of the faithful.* Ps. 100:1-2, 4; 149:1b (Jewish Publication Soc'y 1999).

* * *

> *Those who are near to the Lord, disdain not to do Him worship: They celebrate His praises, and bow down before Him. . . . But celebrate the praises of thy Lord, and be of those who prostrate themselves in adoration.* Qur'an, Sura 7:206, 15:98 (http://www.islamicity.com/mosque/TOPICQ/P.htm).

Sermons, prayers, chants, and singing all involve speech. Putting such speech in the context of a "religious service" does not make it any less "speech." Indeed, Faith Center's service was described as "Prayer, Praise and Worship," including a "Purpose to Teach." 462 F.3d at 1199.

The fact that there are some symbolic actions practiced in services of all the major religions does not alter the analysis. For instance, in Christianity, baptism and the Eucharist could perhaps be defined as the quintessential experiences of the worship service. But even these practices cannot be divorced from speech. An individual is not baptized by taking a walk in the rain, and one does not celebrate the Lord's Supper by snacking on wine and saltines. Similarly, bowing towards Mecca is directly associated with prayer, and Seder rituals are entwined with spoken messages passed down through the centuries. The words spoken are central to the physical practices performed in these various religions.

But even if sacramental or other acts in a religious service are viewed in isolation, they are protected "speech" expressions. It would be odd, indeed, if participating in religious sacraments were not given at least as much protection under the Free Speech Clause as is nude dancing or burning the flag. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (nude dancing is expressive conduct afforded some First Amendment protection); *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning is protected "speech"); *see also Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (wearing black arm bands); *Brown v. La.*, 383 U.S. 131 (1966) (silent sit-in at public library room).

IV. Certiorari Should Be Granted Because the County's Policy, Even If Otherwise Valid, Generates an Improper Entanglement

Of course, the Ninth Circuit majority's parsing of "religious speech" and "religious services" rests on a voracious reading of the Establishment Clause – that it trumps the Free Exercise Clause in all particulars and requires public institutions not just to treat religious speech neutrally, but to identify and extirpate it from public facilities. This has never been the law, and it is a serious misreading of the Religion Clauses, which should be read in harmony, not in opposition. *See generally* Carl H. Esbeck, *"Play in the Joints Between the Religion Clauses" and Other Supreme Court Catachreses*, 34 HOFSTRA L. REV. 1331 (2006); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2207 (2003); Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1088 (1996).

Religious speech, it is suggested, may be treated differently because it is "controversial." *Faith Ctr. Church*, 462 F.3d at 1206-07, *citing DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 966 (9th Cir. 1999). In actuality, very few religious services are controversial. But even if they were, it would be impossible to distinguish them from a Democratic Party meeting in which potential Presidential candidates were heatedly

discussed.[3] The county allowing the Democratic Party to use its library meeting room no more "establishes" the Democratic Party as the county's party of choice than allowing Faith Church to use it "establishes" that church as the county's favorite. The likelihood for contentious debate does not distinguish religious speech and activities from other types of speech. "The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political affiliation. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring); *see generally* Richard Garnett, *Religion, Division and the First Amendment*, 94 GEO. L.J. 1667 (2006).

Far from protecting against an Establishment Clause violation, the undertaking Judge Kramer suggests (and the majority opinion attempts) itself violates both the Free Speech and the Establishment Clauses. The majority in applying the county's policy must look over the shoulders of the county

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[3] A similar amorphous concern about contentiousness was raised and rejected by this Court in *Lamb's Chapel*: "The District also submits that it justifiably denied use of its property to a 'radical' church for the purpose of proselytizing, since to do so would lead to threats of public unrest and even violence. . . . There is nothing in the record to support such a justification, which in any event would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject the District otherwise opens to discussion on District property." 508 U.S. at 395-96.

employees and attempt to distinguish "religious services" from "educational, cultural and community related meetings, programs, and activities." *Faith Ctr. Church*, 462 F.3d at 1199, 1198, 1212-1214. The Free Speech Clause does not allow distinctions due to content, but that is exactly the exercise which the policy requires. *Eichman*, 496 U.S. at 315-17 (Congress cannot criminalize flag burning on the grounds that content of expression is offensive); *Widmar*, 454 U.S. at 273 (public university could not discriminate against religious group based on the content of their speech); *Healy v. James*, 408 U.S. 169, 187 (1972) (public university president could not deny political group official recognition because he disagreed with the content of their speech).

Nor is it a permissible judicial exercise to attempt to parse what is "religious services" content and what is not. This Court has already found that distinguishing "worship" from other speech is an "impossible" task. *Widmar*, 454 U.S. at 272 n.11; *see also id.* at 271 n.9 (distinction is "judicially unmanageable"). "Merely to draw the distinction [between religious worship and religious speech] . . . would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.* at 269 n.6.

CONCLUSION

The Ninth Circuit's decision has the potential for great mischief throughout both that Circuit and this country. It allows the government to prohibit the free exercise of religion and to discriminate against religious speech as if it were disfavored, rather than expressly protected, under our Constitution. At a minimum, it requires courts to entangle themselves in distinguishing between "religious services" and other "religious speech."

The *amici* request that this Court grant the petition and, following review, reverse the United States Court of Appeals for the Ninth Circuit and reinstate the injunction of the district court.

Respectfully submitted,

FREDERICK W. CLAYBROOK, JR.
CROWELL & MORING LLP
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(202) 624-2500
Counsel for Amici Curiae

August 7, 2007

From: Cheung, Peggie
[mailto:Peggie.Cheung@montgomerycountymd.gov]
Sent: Tuesday, July 17, 2007 11:03 AM
To: Jastrem, Laura
Cc: Gong, Ginny; Habermann, Elizabeth
Subject: RE: Information Request

Ms. Jastrem,

Per your request, attached are 2 lists of religious groups utilizing public space in FY07 and FY06. Let me know if you have any questions.

Peggie Cheung
IT Specialist
Community Use of Public Facilities
240-777-2714

-----Original Message-----
From: Jastrem, Laura
[mailto:LJastrem@crowell.com]
Sent: Thursday, June 14, 2007 3:57 PM
To: Gong, Ginny
Subject: Information Request re: Community Use of Public Facilities

Dear Ms. Gong,

I am writing to request that a copy of documents containing the following information please be provided to me:

(1) A list of the community organizations or groups that currently rent or use public space in Montgomery County (or, if it is easier to provide, simply a list of any religious/spiritual/faith-based groups that currently rent or use such space); and, if available

(2) A list of the community organizations or groups that have rented or used public space in Montgomery County in the past year (or, if it is easier to provide, simply a list of any religious/spiritual/faith-based groups that used such space in the past year)

I am an attorney at Crowell & Moring, and this request is made as part of a fact gathering effort we are undertaking on behalf of a non-profit organization.

If possible, please send this information to me via e-mail attachment or fax (Attn: Laura Jastrem 202-628-5116).

Thank you for your consideration of this request. Please do not hesitate to contact me if you have any questions or concerns, or if you need any additional information in order to process this request.

Laura M. Jastrem, Esq.
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.

Washington, D.C. 20004
p: (202) 624-2613
f: (202) 628-5116
LJastrem@crowell.com

Religious Groups Utilizing Public Space in
Montgomery County - FY 2007
Tuesday, July 17, 2007 ReligiousUsers-2007

Abundant Life Christian Church
Abundant Life Church of God
Adat Shalom Reconstructionist Congr.
Agape Foundation
Aish Hatorah of DC MD VA
All Nations International Church
Allen Chapel A.M.E. Church
Am Yisrael
Amazing Grace AME Zion Church
Apostolic Church
Asian Indian Christian Church
Assembly of Christian Churches
BAPS HE
BAPS, Inc
Believers Miracle Center
Bethel World Outreach Ministries
Bethesda International Church
Bethesda Seventh Day Adventist
Bezerra de Menezes Spiritist Society
B'nai Shalom Congregation
B'nai Tzedek Religious School
Bread of Life Christian Church
Burning Bush United Meth. Church

Calvary Pentecostal Ministries
Camp Sonshine
Chabad Lubavitch - Upper Montg. County
Chabad Lubavitch of Bethesda/Chevy Chase
Chabad Lubavitch of Silver Spring
Chilean-America Foundation
Chinese Bible Church of MC
Chinese Bible Church of MD
Chinese Christian Ch-Germantown
Chinese Christian Church
Chinmaya Mission
Chong Hwa Saint Tao Yuan c/o M. Quan
Christ City of Peace Evangelical Min
Christ Foundation Family Church
Christ Gospel Church
Christian Baptist Church
Christian Church of MD
Christian Congregation
Christian Orientation
Church of Christ
Church of God
Church of God in Rockville
Church of Jesus Christ LDS
Church of the Rapture FY08
Church of the Redeemer
Church of the Resurrection CYO
Congregation Beth El
Congregation Har Shalom
Cornerstone Reformed Pres Church
Crossroads Church of Montgy Cty
Damascus Church of the Nazarene
Damascus Road Community Church
DAY of Gaithersburg

DAY of Germantown - Neelsville
DAY of Silver Spring - Kennedy
DC Christian Fellowship
Deeper Life Bible Church
Deliverance Tabernacle Church FY07-08
Deliverance Tabernacle Church of God
Derwood Bible Church
Disciples Fellowship Int'l
Eglise de Dieu de Silver Spring
El Shaddai Metro. Ministries
Evangelical Formosan Church Wash
Exousia Ministries
Extreme Youth Revival
Faith Community Church
Faith Community Church of GLNR
Faith International Church
Faith Tabernacle Ministries
Faithful and True Christian Center
Fellowship of Light Church
Fountain of Grace
Fourth Presbyterian Church
Gaithersburg Church of Nazarene
Germantown Spanish SDA Church
Getsemani Church
Ghanaian Presbyterian Mission
Glenmont Spanish SDA Church
Glorious Tabernacle Outreach
God Glorified Church
Good Hope Reformed
Gospel Baptist Church
Gospel of Power Int'l Ministries
Grace Community Church
Grace International Deliverance

Greater Grace World Outreach
Greater Hope A.M.E. Zion Church
Greenridge Baptist Church
Guru Gobind Singh Foundation
Guru Harkrishan Sikh Studies Institute
Haitian Christian Church
Heritage of Hope Christian Church
Hevrat Shalom Congregation
Highway Christian Church
Holiness Church of God
Holy Cross Faith Ministry
Hope Alliance Church
Hope International Christian
House of Prayer Evangelistic Ministry
Iglesia Amanecer en Cristo
Iglesia De Cristo De Restauracion
Iglesia De Dios Ministerial
Iglesia E Apostoles Y Profetas
Iglesia E Berea
Iglesia E El Mesias
Iglesia La Familia de Cristo
Iglesia Pent Un Paso Mas de Fe El Sinia
Iglesia Pentecostal Bethel de MD
Iglesia Pentecostal Camino
Iglesia Pentecostal Cristo Misionera
Iglesia Pentecostal Cristo Rey
Iglesia Pentecostal Remanente Fiel
Iglesia Pentecostal Sinai
Iglesia Pentecostes Amor y Santidad
Iglesia Pentecostes Bethel
Immanuel AME Zion Church
Indonesian Christian Fellowship Church
Inner Court Family Worship Cntr

Interfaith Families Project
International Central Gospel
International Chapel Assemby of God
Islamic School of Potomac
Islamic Weekend School
Jain Society of Metro Washington/A. Shah
Jehovah's Witnesses
Jehovah's Witnesses-Spanish Congregation
Jesus Christ Ministries
Jesus Christ Universal Mission
Journey's Crossing
Joy Mission Church
Kehila Chadasha
Kenyan International Community
King of Kings International Church
Kingdom Harvest International
Kol Shalom Hebrew School
Last Call Christian Ministries
Layhill Community Free Methodist Church
Libertando A los Cautivos, Inc
Life & Salvation Church
Life & Salvation Church of USA
Life Impact Tabernacle
Lighthouse Chapel Intl
Living Gospel Outreach Church
Longing for Jesus Christian Ch.
Maranatha Gospel Church
Maryland Central Korean SDA Church
MI-EL MD Iglesia De Cristo
Ministerio Cristiano Rosa Firme
Ministerio JEBP
Ministerios E.M. Shalom Adonai
Mission NDPS

Montgomery Co Church of Christ
Montgomery Village Spanish SDA
Mother Seton Parish
Mt. Sinai AME Zion Church
New and Living Hope Miracle Center
New Covenant Fellowship Church
New Creation Miracle Church
New Generation Believers Intl
New Generation Christian Ministries
New Generation Outreach Ministries
New Hope Christian Church
New Life Christian Fellowship
New Life Church of God in Christ
New Life Church of Washington
New Life Church/Ministries
New Testament Church
Non-Affiliated MD School For Jewish Educ
Norbeck Community Church
Northwest Church of Christ
Ohev Shalom Talmud Torah Congregation
Olney Kehila - Am Kolel
Our Lady of the Presentation
Our Lady of Vietnam Church
Overcoming Church
Peace In The Valley Baptist Church
Pentecostal Church Senda de Jus
Pentecostal Praise Intl Outreach
Pentecostal Renewal Ministry
People's Community Baptist Church
Philippine International Bible Church
Power House Baptist Church
Redeemer Word Assembly Ministries
Reid Temple AME Church

Restoration Int'l Holiness Church
Resurrection Baptist Church
River of Life Christian Center
Roca de Salvacion
Rock of Salvation Evangelical
Rockville Evangelical Mission
Science of Sprituality
Scotland AME Zion Church
Seneca Creek Community Church
Shaare Tefila Congregation
Shaare Torah, Inc
Shalom School
Shiloh Christian Fellowship
Shining Light Baptist Church
Soka Gakkai Intl-USA/Montgomery West
Soldier of the Cross
Solid Rock Community Church
Spring Of Life Fellowship Church
SSSBC
St. Andrew Kim Catholic Church
St. Gregorios Orthodox Church
St. John Newmann Catholic Church
St. Jude A.M.E. Church
St. Luke Serbian Orthodox Church
St. Martins Catholic Church
St. Paul's Church
St. Raphael Catholic Church
Sts Constantine & Helen Greek
Sugarloaf Congregation of Unitarian Univ
Takoma Park Seventh Day Adventist Church
Tapestry Church
Temple Shalom
Through Mercy Gates Ministries

Time of Grace Ministries
Tree of Life Church
True Bride Tabernacle
Una Luz en El Desierto Church
United Christian Church
United Worship Ministries
Unity In Silver Spring
Upper Room Ministries
Victory Chapel Christian Church
Village Community Church
Voice of Faith Intl. Ministries
Washington Apostolic Church
Washington Brazilian SDA Church
Washington DC Buddhists Association
Washington International Church
Washington Malayalam Adventist Church
White Oak Cong. Kids & Young Adults
Woodside Synogogue
Word in Action Ministries
Word of Life Gospel Church
World Ministry Church Intl
World Outreach Church
World Outreach Church
Young Israel of White Oak

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(2)

No. 06-1633

IN THE
Supreme Court of the United States

FAITH CENTER CHURCH EVANGELISTIC MINISTRIES
and HATTIE HOPKINS,

Petitioners,

v.

FEDERAL D. GLOVER, MARK DE SAULNIER,
JOHN M. GIOIA, MILLIE GREENBERG,
JOHN W. SWEETEN, ANNE CAIN, PATTY CHAN,
LAURA O'DONAHUE and GAYLE B. UILKEMA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF THE PETITION FOR CERTIORARI

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August 7, 2007

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, *amicus* states that it has no parent companies or nonwholly owned subsidiaries.

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INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF has supported longstanding principles of morality in American society, and has consistently defended the right of religious expression. Eagle Forum ELDF has a strong interest in protecting the right of religious organizations to equal access to public property.

SUMMARY OF ARGUMENT

The Ninth Circuit's 2-1 decision conflicts with this Court's precedents and creates an unwarranted split among the circuit courts. The panel majority's opinion is internally inconsistent in its attempt to circumvent this Court's precedents guaranteeing religious organizations equal access to facilities that are open to the public. Judge Karlton's concurrence, while more direct and to the point, manifests a blatant hostility to this Court's prior rulings, lamenting the "sorry state of the law" articulated in this Court's decisions and "pray[ing] for the court's enlightenment." (App. 37a, 40a.) Seven judges on the Ninth Circuit (the "Ninth Circuit dissenters") recognized that the panel's split decision

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[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief; pursuant to Supreme Court Rule 37.2, letters evidencing this consent have been filed with the Clerk.

warrants further review, filing a vigorous dissent from the court's denial of rehearing en banc. (*See* App. 87a-104a.)

The issue presented here is of fundamental importance. The Ninth Circuit held that the district court abused its discretion when it found that a county library must give equal access to a Christian group seeking to utilize one of its public meeting rooms. (App. 2a.) The library offered these public meeting rooms for "educational, cultural and community related meetings, programs and activities." (App. 2a-3a.) However, it specifically prohibited certain religious activities, stating that the library's meeting rooms "shall not be used for religious services." (App. 3a.) The district court correctly held that petitioners were denied equal access to the facilities and properly granted their motion for a preliminary injunction. (App. 67a.)

The Ninth Circuit's ruling to the contrary defies both law and logic. The court did not dispute that petitioners "engaged in protected speech when [their] participants met in the Antioch library for prayer, praise, and worship." (App. 11a.) Nonetheless, it held that petitioners could not engage in religious worship because the library meeting room was a "limited public forum" and "the County's policy to exclude religious worship services from the meeting room is reasonable in light of the forum's purpose." (App. 15a.) However, the county specifically defined that purpose as *excluding* religious worship. The court's reasoning is therefore circular and allows public entities to define away religious organizations' equal access rights by merely defining the "limited" forum as one that excludes certain religious practices.

At the same time, the Ninth Circuit's reasoning is internally inconsistent. In attempting to circumvent this Court's well-settled precedents guaranteeing religious organizations equal access to public facilities, the panel majority held that petitioners had a right to engage in "prayer", but not "religious worship". This is a distinction

without a difference. More fundamentally, the court's decision requires public officials to engage in hair-splitting to discern what constitutes "prayer" as opposed to a "worship service" and make judgments that entangle the government in private religious practices, thereby violating the Establishment Clause.

For these reasons and others stated below, the petition should be granted.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Is Contrary To This Court's Well-Settled Precedent And Creates An Unwarranted Intercircuit Conflict.

This Court has unequivocally held that "religious worship and discussion . . . are forms of speech and association protected by the First Amendment." *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Id.* at 267-68. Accordingly, "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001); *see also Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 828 (1995); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 387, 393-94 (1993).

Amicus agrees with petitioners that the court of appeals erred in finding that the library constituted a "limited public forum" as opposed to a "designated public forum." (*See* Pet. 23-29; App. 15a.)[2] However, regardless of the classification,

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[2] The dissent specifically found that the library was a designated public forum, and not a "limited" public forum, but held that the library's policy

the Ninth Circuit's decision violates the guarantee of equal access set forth in *Widmar* and *Good News Club*. The panel majority conceded that "the County's purpose was to invite the community at large to participate in use of the meeting room for expressive activity." (App. 15a.) Nonetheless, it asserted that the library did not open its meeting rooms "for indiscriminate use" because it required the submission of an application that "must be reviewed and approved in advance" and specifically excluded "religious services." (App. 17a.) The panel majority claimed, without any citation to the record, that the library's exclusionary policy was designed to "preserve the character of the forum as a common meeting space, an alternative to the community lecture hall, the corporate board-room, or the local Starbucks." (App. 19a.)

However, excluding religious "worship" has nothing to do with "preserving" such characteristics of the space. To the contrary, religious worship inherently involves utilizing the meeting rooms as a "common meeting space." Moreover, even if the library had such an objective, as the panel majority conceded, the library may not "discriminate against a speaker's viewpoint." (App. 20a.) Accordingly, the library cannot discriminate against religious organizations by defining the "limitation" on the public forum to specifically exclude those with a religious viewpoint.

This Court's well-settled precedent makes clear that the library may not exclude "religious worship" any more than it

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was unconstitutional under either designation. (App. 53a n.5.) The district court made no finding on this issue. (*See* App. 76a n.9.) As discussed below, much of the Ninth Circuit's error may be traced to its determination that the library was a "limited public forum" and its interpretation of that doctrine as allowing government actors to impose limitations that are defined in such a way as to specifically exclude whole categories of religious speech.

may exclude the promotion of atheism or libertarian philosophy. *See Good News Club*, 533 U.S. at 112; *Rosenberger*, 515 U.S. at 828. Nonetheless, the panel majority allowed the library to do just that, relying upon a *dissent* issued by two Justices to conclude that such limitations were "reasonable" and thus constitutional, asserting that it would be "remarkable" if a "'public [building] opened for civic meetings must be opened for use as a church, synagogue, or mosque.'" (*See* App. 20a (quoting *Good News Club*, 533 U.S. at 139 (Souter and Ginsburg, JJ., dissenting).)

Nor is the county's discriminatory behavior justified by an "interest in screening applications and excluding meeting room activities that may interfere with the library's primary function as a sanctuary for reading, writing, and quiet contemplation." (App. 20a) The panel improperly *assumed* that religious worship was "controversial" and "alienating" and that the library must have reasonably wanted to exclude it. (App. 20a-21a.) Whether "offensive" or not, worship remains protected by the First Amendment, as are controversial views generally. *See Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."). By allowing the library to define the "limited forum" to exclude religious worship and then claim that petitioners "exceeded the boundaries of the library's limited forum" (App. 28a), the Ninth Circuit effectively eviscerated petitioners' equal access rights.

In the process, the court misconstrued or ignored well-settled precedent holding that such limitations are impermissible. This Court has repeatedly held that access may not be restricted if the restriction is based on "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829. In *Widmar*, for example, the Court ruled unconstitutional a policy that

barred the use of university buildings "for purposes of religious worship or religious teaching" on the grounds that "[t]hese are forms of speech and association protected by the First Amendment." 454 U.S. at 265 & n.3, 269. In *Rosenberger*, the Court likewise held that the University of Virginia's policy of excluding religious publications from eligibility for student funds violated the Constitution because the University "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." 515 U.S. at 831. In *Lamb's Chapel*, the Court held that a school district acted unconstitutionally when it opened its property for "social, civic, and recreational uses," but specifically prohibited its use for "religious purposes." 508 U.S. at 387, 393-94. Finally, in *Good News Club*, the Court held that a school district engaged in viewpoint discrimination when it refused to allow a Christian children's club to offer a religious perspective on moral and character development in a school forum that was open to the public. 533 U.S. at 108. The Court found that the school district engaged in impermissible viewpoint discrimination when it banned such religious speech. *See id.*

These cases involved facts legally indistinguishable from those at issue here. Nonetheless, the panel majority attempted to circumvent these decisions on the ground that a footnote in *Good News Club* allegedly draws a distinction between religious speech and "'mere religious worship, divorced from any teaching of moral values.'" (App. 25a (quoting *Good News Club*, 533 U.S. at 112 n.4); *see also id.* at 29a.)[3] As petitioners and the Ninth Circuit dissenters

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[3] Judge Karlton's separate concurrence is more candid. Instead of attempting to engage in the "laborious" effort to parse this Court's prior decisions to uphold the library's exclusionary policies, Judge Karlton simply disagreed with this Court's decisions in *Good News Club* and *Lamb's Chapel*, claiming that they misread the First Amendment because they do not recognize that "religious speech is categorically different than secular speech and is subject to analysis under the Establishment

correctly observe (*see* App. 99a-101a; Pet. 16-19), this argument plainly misreads the Court's opinion, which made no such distinction and did not authorize the exclusion of any particular forms of religious speech. Moreover, as petitioners and the Ninth Circuit dissenters also observe (*see* App. 96a-101a; Pet. 19-21), this reading is inconsistent with this Court's decisions as a whole, which have made clear that there is no such purported distinction.

In *Widmar*, for example, this Court specifically held that such a distinction had no "intelligible content." 454 U.S. at 270 n.6. "There is no indication when 'singing hymns, reading scripture, and teaching biblical principles,' cease to be 'singing, teaching, and reading'—all apparently forms of 'speech,' despite their religious subject matter—and become unprotected 'worship'." *Id.* The Court further found that "even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer." *Id.* "Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.*

More fundamentally, the panel majority's attempt to circumvent this Court's precedents is internally inconsistent. It conceded, for example, that petitioners' "Wordshop" meeting, which included "fervent . . . prayers," "teaching" and "singing", was permissible under the county's policy and

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and Free Exercise Clause without regard to the jurisprudence of free speech." (App. 38a.) However, the First Amendment contains no such exclusion. Moreover, because Judge Karlton's vote was necessary to the panel's 2-1 determination, his critique of this Court's prior decisions is an implicit concession that the panel majority's ruling cannot be reconciled with that well-settled law.

that "*Good News Club* makes clear that such speech in furtherance of communicating an idea from a religious point of view cannot be grounds for exclusion." (App. 26a-27a.) Yet, at the same time, the panel asserted that the library properly excluded petitioners' "religious worship." (App. 28a-29a.) There is simply no principled distinction between these activities. Indeed, standard definitions of "religious service" and "religious worship" make clear that such activities are merely a form of "prayer". *See, e.g.*, MERRIAM-WEBSTER'S ONLINE DICTIONARY (defining "prayer" as "a religious service consisting chiefly of prayers"); CAMBRIDGE ONLINE DICTIONARY (defining "pray" as "to speak to a god either privately or in a religious ceremony" and "worship" as "when you worship God or a god, often through praying or singing"); AMERICAN HERITAGE DICTIONARY (4th ed. 2000) (defining "prayer" as "a reverent petition made to God, a god, or another object of worship").

In any event, this Court observed in *Widmar* that if any such distinction could be made, discerning where it applied would impermissibly entangle the government with religion. 454 U.S. at 269; *see id.* at 272 n.11 ("[T]he University would risk *greater* 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.'") (emphasis added). Here, the county would be faced with the "impossible task" of determining "which words and activities fall within 'religious worship and religious teaching.'" *Id.* at 272 n.11. "There would also be a continuing need to monitor group meetings to ensure compliance with the rule." *Id.*

Such entanglement is not merely undesirable—it is plainly prohibited under the Court's Establishment Clause jurisprudence. *See Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971) ("state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids"). By contrast, "an open-forum policy, including nondiscrimination against

religious speech ... would in fact *avoid* entanglement with religion." *Board of Education of the Westside Community School v. Mergens By and Through Mergens*, 496 U.S. 226, 248 (1990) (citing *Widmar*, 454 U.S. at 272 n.11) (emphasis in original).

In sum, the Ninth Circuit's decision severely misreads this Court's precedents and creates a significant intercircuit conflict. As petitioners correctly observe (*see* Pet. 13-16), the Second Circuit properly adhered to this Court's precedents in reaching the opposite conclusion on nearly identical facts. *See Bronx Household of Faith v. Board of Education of the City of New York*, 331 F.3d 342 (2d Cir. 2003). (*See also* App. 57a-59a.) The panel majority's attempt to distinguish *Bronx Household* on the ground that it involved "'elements of worship' that further secular goals" (App. 30a) fails for the same reason that its attempt to distinguish *Good News Club* fails. This Court has simply not articulated an exception to the First Amendment for "mere religious worship." The Ninth Circuit created this exception out of whole cloth. In doing so, the court "disregarded equal-access cases stretching back nearly three decades, turned a blind eye to blatant viewpoint discrimination, and endorsed disparate treatment of different religious groups." (*See* App. 88a-89a (Bybee, J., dissenting).)

II. The Ninth Circuit's Decision Is Based On An Interpretation Of The Establishment Clause That Is Inconsistent With This Court's Precedents.

The Ninth Circuit's decision, however, suffers from a more fundamental flaw. As in *Rosenberger*, the religious exclusion the Ninth Circuit sanctioned here is premised on a reading of the Establishment Clause that this Court has repeatedly rejected. (*See* App. 48a (Tallman, J., dissenting); App. 80a.) Thus, the panel majority asserts that religious worship is inherently "controversial" and "alienating" and that the government must exclude such conduct from public property because it is "not a secular activity." (App. 28a,

36a.) Likewise, Judge Karlton criticizes this Court's analysis in *Good News Club* and *Lamb's Chapel* on the ground that the Establishment Clause creates a "wall of separation between church and state" that expressly prohibits any government role in religious life. (App. 39a.) Rather than guaranteeing religious liberty, he contends that the First Amendment "serves the salutary purpose of insulating civil society from the excesses of the zealous" and laments "[t]he *Good News Club* and *Lamb's Chapel* majorities' disdain of [this] Jefferson model." (App. 40a.)

As a threshold matter, in engaging in such analysis, the Ninth Circuit misunderstood the issue before it. As this Court observed in *Widmar*: "The question is not whether the creation of a religious forum would violate the Establishment Clause. The [library] has opened its facilities for use by [community] groups, and the question is whether it can now exclude groups because of the content of their speech." 454 U.S. at 273. (*See also* App. 59a (Tallman, J., dissenting).) There is "no realistic danger" that the community would think the library "was endorsing religion or any particular creed" by allowing equal access to its facilities. *Lamb's Chapel*, 508 U.S. at 395. Any "benefit to religion or to the Church" would have been incidental. *Id.*

More fundamentally, the Constitution neither requires nor permits the government to expunge from public property all religious speech in order to ensure a purely "secular" forum. To the contrary, this Court has repeatedly held that the expression of religious viewpoints on public property does not offend the Constitution. *See, e.g., Good News Club*, 533 U.S. at 112-19; *Lamb's Chapel*, 508 U.S. at 394-96; *Widmar*, 454 U.S. at 271-75. Indeed, the Constitution expressly *protects* the right to engage in such expression. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* ....") (emphasis added).

Accordingly, this Court has repeatedly "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger*, 515 U.S. at 839; *see also Lamb's Chapel*, 508 U.S. at 393-94; *Mergens*, 496 U.S. at 248, 252; *Widmar*, 454 U.S. at 274-75. In sum, the Ninth Circuit's opinion manifests a hostility to public religious expression that is neither required nor permitted by the Constitution.

CONCLUSION

For the foregoing reasons, Eagle Forum ELDF respectfully requests that the Court grant the petition for a writ of *certiorari*.

Respectfully submitted,

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